CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1929

CERTIORARI GRANTED NOVEMBER 4, 1929

(34,555)

(34,555)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from the district court of the United States, Western Pennsylvania	1	1
Docket entries	1	1
Forfeiture libel and order thereon	3	2
Answer	9	6
Statement of evidence	16	11
Motion to dismiss	16	11
Testimony of Harvey G. Jarrett	17	12
Fred Weinheimer	37	25
Samuel T. Eisler	41	28
H. E. Blakesley	47	32
Ike Danovitz	54	37
Manfred Feitler	61	41
Frederick C. Buckmaster	72	49
Order for decree	73	50
Reporter's certificate (omitted in printing)	74	
Judge's certificate	74	50

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 18, 1929

	Original	Print
Government Exhibit No. 1—Affidavit for search warrant	75	51
Search warrant	77	52
Return on search warrant	79	53
Decree	83	56
Notice of appeal	84	57
Petition for supersedeas	84	57
Order of supersedeas	87	58
Assignments of error	87	59
Proceedings in United States circuit court of appeals, third circuit	92	61
Assignments of error	92	61
Argument and submission (omitted in printing)	95	
Opinion, Woolley, J	96	63
Decree	105	70
Clerk's certificate (omitted in printing)	105½	
Order allowing certiorari	106	71

[fols. a & 1]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. P536, Law

UNITED STATES OF AMERICA

vs.

CONTRABAND LIQUORS, PROPERTY AND MATERIAL DESIGNED FOR the Manufacture of Contraband Liquors, Manfred Feitler, Joseph Abbott, Ike Feitler, Elmer Morris, Sarah Swide, Sam Green, Jess Levy, Morris Greenberg

DOCKET ENTRIES

May 24, 1928.—Libel filed and Order entered for a Monition returnable June 14, 1928.

May 24, 1928.—Monition issued.

Jun. 1, 1928.—Monition returned served and filed.

Jun. 6, 1928.—Answers of Manfred Feitler and Ike Danovitz filed.

Jun. 15, 1928.—Affidavit of M. Feitler filed.

Oct. 11, 1928.—Hearing on Libel, answer and proofs (argued C. V. A. Shoonmaker, J.)

[fol. 2] Oct. 25, 1928.—Order of court filed and entered directing that the seizures be forfeited to the United States and be destroyed by John D. Pennington, Federal Prohibition Administrator.

Oct. 25, 1928.—Notice of appeal, with acceptance of service thereon, filed.

Oct. 25, 1928.—Petition of Manfred Feitler and Ike Danovitz for supersedeas on appeal filed.

Oct. 25, 1928.—Order of Court filed and entered allowing supersedeas pending appeal; supersedeas bond on appeal in the sum of $3,000.00 to be furnished within ten days.

Oct. 26, 1928.—Citation issued, returnable November 26, 1928.

Oct. 26, 1928.—Citation with service accepted thereon, mailed to C. C. of Appeals.

Nov. 2, 1928.—Supersedeas bond sur appeal approved by the Court and filed.

Nov. 8, 1928.—Assignments of Error filed.

Dec. 12, 1928.—Transcript of Testimony filed.

Jan. 2, 1929.—Stipulation as to record on appeal filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

FORFEITURE LIBEL AND ORDER THEREON

To the Honorable the Judges of said Court:

The Libel of John D. Pennington, Federal Prohibition Administrator, District No. Six, Pittsburgh, Pennsylvania, respectfully represents:

1. That there is in the custody of your Libelant certain contraband liquors, property and material designed for the manufacture of contraband liquors, hereinafter more fully set forth and enumerated, which were unlawfully possessed, held and used in violation of Section 25, Title II, of the National Prohibition Act.

2. That the said contraband liquors, property and material designed for the manufacture of contraband liquors are now stored in the Government Warehouse at 80 Allen Avenue, Pittsburgh, Pennsylvania.

3. That the hereinafter described contraband liquors, property and material designed for the manufacture of contraband liquors were lawfully seized from Manfred Feitler, 5735 Hobart Street, Ike Feitler, 5735 Hobart Street, Sarah Swide, 1228 Wylie Avenue, Jess Levy, 70 Roberts Street, Joseph Abbott, 3957 Perrysville Avenue, Elmer Morris, 1720 Watson Street, Sam Green, 849 Highview Street, Morris Greenberg, 849 Highview Street and David Kart, 5728 Darlington Road, Squirrel Hill, all of Pittsburgh, Pennsylvania, and were seized at a place known as 1026-1028 Watson Street, Pittsburgh, Pennsylvania.

4. That the contraband liquors, property and material designed for the manufacture of contraband liquors seized

[fol. 4] and now held by your Libelant, consist of the following:

Date	Quantity seized	Place seized
5/10/28.	1 5-gallon jug whiskey, part full.	Seized in buildings used as Warehouse at 1026-1028 Watson Street, Pittsburgh, Pa., from Manfred Feitler, Ike Feitler, Sarah Swide, Jess Levy, Joseph Abbott, Elmer Morris, Sam Green, Morris Greenberg and David Kart.
	1 5-gallon jug whiskey and chips, part full.	
	1 1-gallon jug part full whiskey.	
	135 Empty 5-gallon cans.	
	422 Cases empty bottles.	
	49 Pkgs. empty bottles.	
	6 1-gallon empty jugs.	
	1 10-gallon empty can.	
	2 5-gallon crocks.	
	1 25-gallon empty can.	
	4 Boxes gin bottle caps.	
	1,837 Cartons empty pint bottles.	
	203 Bundles cardboard cartons.	
	80 5-gallon demijohns empty.	
	75 5-gallon demijohns empty.	
	1 Box bottle caps.	
	124 Bundles of small flat pieces cardboard.	
	5 Bundles paper.	
	5 Cartons ½-pint bottles.	
	1 Carton quart bottles.	
	11 Cartons gin bottles.	
	3 Cans Clyco.	
	1 Case 2-oz. bottles.	
	42 Cases quart bottles.	

[fol. 5]

	18 Cases bottles in paper cases.	
	192 Packages flat empty cardboard cartons.	
	10 Trunks empty bottles.	
	5 Bbls. part full of bottles.	
	4 Cases part full of bottles.	

Quantity seized

65 Cases part full of bottles.
110 Bundles paper cartons.
62 Bundles cardboard fillers.
258 Bags of corks.
13 Boxes of corks.
1 Box of sealing wire.
3 Boxes wrappers for whiskey bottles.
2 Bags of cartons for bottles.
1 5-gallon can part full liquor.
5 Cartons for whiskey bottles.
1 Box twine.
16 Boxes paper wrappers for whiskey bottles.
13 Boxes caps for bottles.
1 Box cardboard bottle separators.
7 Bundles paper bags.
10 Crimping machines.
3 Labeling machines.
7 Siphons and filters.
1 Box assorted whiskey labels.
1 Box flavoring nuts.
2 Cases glycerine.
1 Case gin extract.
4 Gallons syrup.

[fol. 6]

1 Paper roll holder.
2 Cans Viscose caps.
1 Large wood case corks.
2 5-gallon cans glycerine.
1 Roll of paper.
1 Box wrappers for bottles.
3 Bundles tissue wrappers.
5 Bundles bottle cartons.
4 Bundles heavy wrapping paper.

Quantity seized

8 Boxes bottle cartons.
1 Bundle paper bags.
10 Bundles paper wrappers.
10 Boxes bottle cartons.
402 Whiskey barrels all containing whiskey chips and having strong odor of whiskey, and more than half containing small quantity of whiskey.

5. That there has been no plea or no conviction of the owner of such contraband liquors, property and material designed for the manufacture of contraband liquors.

6. That in accordance with Section 25, Title II, of the National Prohibition Act which in part states that such property so seized shall be subject to such disposition as your Honorable Court may make thereof and your Libelant being without authority to dispose of the said con-
[fol. 7] traband liquors, property and material designed for the manufacture of contraband liquors without authority from your Honorable Court:

Prayers

Wherefore your Libelant respectfully prays your Honorable Court:

1. That all of the foregoing contraband liquors, property and material designed for the manufacture of contraband liquors be condemned and forfeited and that the same may be disposed of according to law in such manner as your Honorable Court may direct.

2. That a Monition issue directed to the aforenamed party or parties and all other possible parties in interest, to be and appear in and before the Court fifteen days after service of the aforesaid Monition, to interpose any claim they may have upon the aforesaid contraband liquors, property and material designed for the manufacture of contraband liquors and in the event a return N. E. I. is made

thereto, that said Monition be advertised in a newspaper of general circulation in the city of Pittsburgh, Pennsylvania, and the Pittsburgh Legal Journal once a week for two weeks.

John D. Pennington, Federal Prohibition Administrator, District No. Six, Pittsburgh, Pa.

[fol. 8] *Duly sworn to by John D. Pennington. Jurat omitted in printing.*

Order of Court

And now, to wit, this 24th day of May, A. D. 1928, upon presentation of the foregoing Libel and upon consideration thereof, it is ordered that a Monition issue directed to the party or parties named in the foregoing Libel, and in the event a return N. E. I. is made thereto, it is ordered and directed that said Monition be advertised in a newspaper of general circulation in the City of Pittsburgh, Pennsyl-
[fol. 9] vania, and the Pittsburgh Legal Journal, once a week for two weeks, returnable the 14th day of June, A. D. 1928.

F. P. Schoonmaker, United States District Judge.

In United States District Court

Answer

To the Honorable, the Judges of said Court:

Come now Manfred Feitler and Ike Dancvitz, and respectfully inform the Court they are co-partners, doing business as the Feitler Bottle Company, which is a mercantile establishment dealing at retail and wholesale in new and used bottles, cooperage and other lawful articles of trade, and as such are the owners and sole proprietors of the property included in this action, and as such owners and claimants of the said property, make answer to the Libel in this action filed, and respectfully inform the Court:

1. They admit that certain property is in the custody of the libellant, but deny the property in this action involved

is contraband, or designed for the manufacture of contraband liquors, or held or used in violation of Section 25, Title II, of the National Prohibition Act or other laws.

2. They admit that the said property is stored at 80 Allen Avenue, Pittsburgh, Pennsylvania, but deny that it is contraband or designed for the manufacture of contraband liquors.

[fol. 10] 3. The allegations of paragraph three are denied. Respondents allege, however, that the said property was seized from Manfred Feitler and Ike Danovitz only, from the said premises at 1026-28 Watson Street, Pittsburgh, Pennsylvania, and allege that the said seizure was unlawful, and in violation of the rights of the respondents under the law and Constitution of the United States.

4. The respondents admit the seizure of the property listed in paragraph four, except the first three items, and expressly deny the seizure of any whiskey or intoxicating liquor fit for beverage purposes on said premises. Also, they deny that the barrels contained whiskey, and aver that these were empty barrels, bought as such, and were in the same condition as received by the respondents, and if any whiskey was in the said barrels it was only such minute residue as would not pour from the said barrels at the time they were emptied prior to their acquisition by the respondents.

And further answering the said fourth paragraph of the libel, the respondents aver and allege that the said list does not include all the articles seized by the libellant and his agents at the time of the execution of the said search warrant, and particularly allege that in addition to the said property therein listed, the following additional property was taken:

2 Large ledger account books.
1 Small ledger account book.
1 Set of Stock sheets.
[fol. 11] 2 Receipt books.
1 Cash book.
1 Lot of sales receipts.
1 Lot of paid bills.
1 Lot of unpaid bills.

1 Bank book.
1 Check book.
1 Lot of pads of bill heads.
1 Monthly Magazine of Bottlers' Association.
1 Lot of catalogues.
1 Lot of letters received, with carbon copies of answers thereto.
1 Typewriter.
1 Adding Machine.
1 Check Protector.
1 $2,000.00 Life Insurance Policy of Ike Danovitz.
1 Receipt for $1500.00 cash bail given by Marshal to Manfred Feitler.
Postage stamps to value of $.80.
Stamped envelopes unused.
1 Box of writing paper.
1 Box of 12 dozen pencils.
1 Bottle of black ink.
1 Inkwell.
1 Box of carbon paper.
4 Files from safe.
3 Files from wall.
1 Eraser.
1 Hand truck, 2 wheeled.
2 Screen doors.
2 Step ladders.
[fol. 12] 2 Brooms.
1 Brush broom.
2 Crow bars.
2 Reamers, 2½ in. and 3 in.
4 Hammers
1 Screwdriver.
1 Iron hoop driver.
1 Saw.
2 Planes.
1 Lot of electric globes.
1 Set of chains for truck.
1 Sweater coat.
1 Raincoat.
1 Pair Women's shoes.
3. Automobiles.
1 Baby buggy.
2 Upholsered rear auto seats.

4 Wire desk baskets.
1 Parcel Post Scale.
Many other articles incidental to the conduct of claimants' business.

Of the foregoing, the following have been heretofore returned by the libellant:

3. Automobiles.
1 Baby buggy.
2 Screen doors.
2 Upholstered rear auto-seats.
1 Victor adding machine.
1 Check-writer—Hedman Mfg. Company.
4 Wire desk baskets.
1 U. S. parcel post scale.
[fol. 13] 1 Ink well.
1 Push broom.
1 Remington Typewriter.

The respondents deny that any of the above described property, or that described in the libel as seized from the said premises, is or was contraband, or subject to forfeiture.

Further answering the fourth paragraph of the libel, claimants do not admit the correctness of the numbers of articles as set forth in the list in said fourth paragraph, and claimants are unable to state the correct numbers since claimants' books of account are in libellant's possession and claimants are without records at the present time. It is alleged that the number of said articles are greater than the numbers contained in said list.

5. The allegations of paragraph five are admitted.

6. Paragraph six is denied if any material allegations or averments be therein contained.

7. And further answering the said libel, the respondents allege and aver that the search warrant was improperly and illegally obtained and issued for the reason that the material grounds upon which it was based are and were false and untrue, and that the said grounds did not authorize or support the issuance of the said warrant; that there was no probable cause to believe there was con-
[fol. 14] traband goods concealed in the said premises.

8. The respondents further answering the said libel, respectfully inform the Court that the said warrant was executed illegally and maliciously and that the agents in executing the same wilfully exceeded their authority under the said warrant, in that they seized large quantities of property not described in the said warrant, and that in making the said search, the agents of the libellant maliciously, unnecessarily and without cause or occasion, destroyed and injured both real and personal property owned, used or occupied by the said respondents.

9. The search and seizure of said propery was further illegal in that a true and complete list of the property seized was not furnished the respondents or left on the said premises, but only a partial and misleading list was so left.

10. The said libel is insufficient in that it does not allege or aver a lawful seizure of the said property, and does not allege or show lawful possession or custody thereof by libellant or by the United States, wherefore, no jurisdiction to hear or determine the question of forfeiture is conferred upon this Honorable Court.

11. The libel in this action does not set forth facts showing the possession of the property to be unlawful, or that the said property is subject to forfeiture, wherefore, this Honorable Court is without jurisdiction under said libel [fol. 15] to order a forfeiture of the said property.

Wherefore claimants pray your Honorable Court as follows:

First. That your Honorable Court will order the return to claimants of all goods seized from claimants' possession from their premises at 1026 Watson Street, Pittsburgh, Pennsylvania, on or since May 10, 1928, in as good condition as they were in when seized, and their careful deposit in place in claimants' premises as claimants may specify, without any cost or expense whatever to claimants.

Second. That your Honorable Court will order the suppression of all evidence obtained by the libellant and his agents as a result of the search warrant and the search and seizure in this case.

Third. That your Honorable Court will dismiss the libel at the costs of the libellant.

Fourth. Such other and further relief as the circumstances of the case may require and to your Honorable Court may appear meet and proper.

And Claimants will ever pray, etc.

Manfred Feitler, Ike Danovitz, Doing Business as Feitler Bottle Company, Claimants. John S. Pyle, Ward Bonsall, Attorneys for Claimants.

[fol. 16] *Duly sworn to by Manfred Feitler and Ike Danovitz. Jurat omitted in printing.*

In United States District Court

Statement of Evidence

Motion to Dismiss

Mr. Bonsall: The claimants move the Court at this time to dismiss this libel, and order the good and articles seized returned to the claimants, the reason being stated in the answer as a question of law, to the effect that the libel is insufficient, on which any order of forfeiture could be made, no matter what the proof might later develop. Two questions are raised in the answer, paragraphs 10 and 11. Paragraph 10 reads: "That said libel is insufficient in that it does not allege or aver a lawful seizure of the said prop-
[fol. 17] erty, and does not allege or show lawful possession or custody thereof by libellant or by the United States, wherefore, no jurisdiction to hear or determine the question of forfeiture is conferred upon this Honorable Court."

And 11 reads as follows: "The libel in this action does not set forth facts showing the possession of the property to be unlawful, or that the said property is subject to forfeiture, wherefore, this Honorable Court is without jurdiction under said libel to order a forfeiture of the said property."

The libel in this action does not set forth facts showing possession of the property to be unlawful, or that said property is subject to forfeiture.

The Court: The libel says the liquor was seized by virtue of a search warrant issued under Section 25, Title 11, of the National Prohibition Act. The motion is denied. We think the libel is sufficient.

Exception noted.

TESTIMONY OF HARVEY G. JARRETT

HARVEY G. JARRETT, a witness produced on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Richardson:

Q. Mr. Jarrett, are you a Prohibition Agent?
A. Yes, sir.
Q. How long have you been an agent?
[fol. 18] A. Nearly one year.
Q. On the 10th day of May, 1928, did you have occasion to visit the premises located at No. 1026-8 Watson street, in this city?
A. I did.
Q. Who was with you, Mr. Jarrett?
A. Agent O. Gettel.
Q. What kind of place was that?
A. It has the appearance of a warehouse. It is a three or four-story building, I do not recall which.
Q. At the time you are now speaking of, did you enter the place?
A. No, sir.
Q. Did you subsequently, to that date, enter the place?
A. I did.
Q. Under what authority did you enter the place?
A. Under authority of a search warrant.

(Exhibit No. 1 marked for identification.)

Q. I show you a paper marked Government Exhibit No. 1, and ask you if that is the search warrant you had that day?
A. It is.

Q. When you entered the place with the search warrant, what did you find?

A. I found a number of men on these premises, sitting around, and after reading the search warrant to one of these men, we started to make a search. During the search, we found a large number of whiskey barrels, glass containers of all sorts, and a large quantity of other materials.

[fol. 19] Q. There was a large quantity of material that was seized at the time?

A. A very large quantity; yes, sir.

Q. What business was this place used for, if you know?

A. Do you know, did you say?

Q. Yes, what did you see going on there?

A. There did not seem to be any activities at the time we entered.

Q. What were the men doing?

A. Some of them were playing cards, and one of them was walking around.

Q. What men did you see there?

A. There were several of the men present here who were present at that time.

Q. Do you know their names?

A. I did that day. I do not recall them individually now.

Q. How many of these men were playing cards?

A. Possibly three or four.

Q. Were there any other persons in the building?

A. Yes, sir.

Q. What were they doing?

A. They seemed to be moving about. We did not stay very long after we read the search warrant, and I did not observe the activities sufficiently to know what was going on.

Q. Was anybody placed under arrest?

A. Yes.

Q. Who?

A. All of the men present.

[fol. 20] Q. You made a search of the premises?

A. Yes.

Q. Do you have your notes there?

A. Yes.

Q. Just tell us some of the things that were seized there at that time?

A. Well, we seized empty five-gallon cans.

Q. How many?

A. 135, I have marked here. 422 empty bottles.

Q. What kind of bottles, Mr. Jarrett?

A. Either pints or half-pints, I have not divided them.

Q. That is, for whisky?

A. Commonly used to contain whisky, yes. There was quite a large number of empty whisky barrels.

Q. How many empty whisky barrels?

A. 369, I have here.

Q. What was the condition of those whisky barrels?

A. They were piled up in the rear of the room we entered and some of them, upon taking the bung out, we noticed contained whisky chips.

Q. What are whisky chips?

A. They are chips made from the shavings of the interior of the whisky barrel.

Q. Was there any whisky in any of these barrels?

A. There was.

Q. Are you able to state what that whisky was?

A. Upon pouring it out, it appeared to be moonshine liquor.

Q. Did you taste it?

A. We tasted it and smelled it.

[fol. 21] Q. Was anybody working there at this time, or were they just stored there in the room?

A. I did not see anybody working near the barrels.

Q. In addition to the five-gallon cans and the barrels, what else was found there?

A. There was a large quantity of wrappers and labels of all sorts, and lead caps, used commonly to put on whisky bottles.

Q. What kind of wrappers?

A. I guess almost every kind that is known.

Q. And what kind of labels?

A. Printed labels, both back and front, and tissue paper wrappers. Some of these had a watermark in the paper.

The Court:

Q. You found they were labels of well-known brands of whisky?

A. Yes, sir.

Q. That were ordinarily placed on bottles of well-known manufacture?

A. Yes, sir.

(Government Exhibit No. 2 marked for identification.)

Mr. Richardson:

Q. I show you this paper marked Government Exhibit No. 2, and ask you if you know what that is?

A. I do not remember having seen this.

(Government Exhibits Nos. 3 and 4 marked for identification.)

[fol. 22] Can you tell me what Exhibit No. 3 is?

A. No, sir, I do not remember having seen that.

Q. I show you Government Exhibit No. 4, and ask you if you will look inside that envelope and tell us what they are?

A. These are some of the strip stamps, the neck stamps, which we found on the premises on that day.

Q. That is Exhibit No. 4?

A. Yes.

(Exhibit No. 5 marked for identification.)

Q. I show you Exhibit No. 5, and ask you whether or not you know the contents of that envelope.

Mr. Bonsall: I call your Honor's attention to the fact that none of these articles which the witness has identified is named in the libel. Can anything not mentioned in the libel be used in this case?

The Court: They are using them merely as evidence as to the unlawful activities that were going on there.

A. These were seized out at the same place that Exhibit No. 4 was seized. I initialed these, so that I am positive they are the same.

Q. Where were the stamps found, Mr. Jarrett?

A. In a small room to the right. The room was divided off by a partition, part was the main storeroom and in this little room in the rear there were shelves and counters and boxes and bins. These things were placed at various places on the shelves.

[fol. 23] Q. Name some of the other things that were seized in this room?

A. There was quite a large variety of material seized, there was a large quantity of strip stamps, wrappers, labels for bottles, lead seal caps, labeling machine for labeling bottles. There was wire. This is about all I can recall offhand. There was also some gin extract and gin flavor and syrups in that room.

Q. Did you, Mr. Jarrett, find any of the bottles labeled, if you recall?

A. Yes, sir.

Q. They were empty bottles or full bottles?

A. They were empty bottles.

Q. Tell us some of the labels, if you recall.

A. The only one I recall was gin bottles.

Q. Is that a square bottle?

A. Yes. After they had been labeled, they were placed in the wrapper and then put back in the carton, either to be filled or sold.

Q. Did you find any similar loose labels around?

A. Yes, sir.

Q. Did you subsequently learn who were the proprietors of this place?

A. Yes, sir.

Q. Who were the proprietors?

A. Mr. Danovitz and Manfred Feitler.

Q. Were they present on that occasion?

A. They were.

Q. Where were they, if you recall?

A. They were somewhere around the front of the building or the office. There is a small office in the front part [fol. 24] of the room, with an entrance right off the street.

Q. Mr. Jarrett, attached to the search warrant is a list of material, with your apparent signature on it. Is that a list of the articles found at the warehouse on that date?

A. It is. It is as near correct as I could get it.

Q. I believe there were some other articles taken at that time. Is that correct?

A. There may or may not have been. I do not know.

Q. I understand somebody took a baby buggy away?

A. I heard of that, but I do not know.

Mr. Richardson: I offer in evidence Government's Exhibits Nos. 1, 4 and 5.

Mr. Bonsall: We have no objection to Government's Exhibit No. 1. As to stamps, claimants object to their introduction in evidence, on the ground that they are not made a part of the libel, and forfeiture of the same is not asked in this case; further, that the strip stamps here offered were not properly seized under the search warrant, and the seizure of them was illegal.

Objection overruled. Exception noted to Defendants.

[fol. 25] Cross-examination.

Mr. Bonsall:

Q. This is your signature, is it not, Mr. Jarrett?

A. Yes, sir.

Q. Is this paper that is a part of Government Exhibit No. 1 the original affidavit for the search warrant upon which the search warrant was based?

A. That is the original.

Q. That was the only affidavit furnished to the United States Commissioner in order to obtain the search warrant?

A. That is the only one I drew up; yes, sir.

Q. Mr. Jarrett, did you furnish either to the claimants or their representatives, or to the owners of the building where this seizure was made, a list or copy of the articles seized?

A. Not personally. When I left these premises, it was about 3:30 A. M., the following morning. There was no one present excepting the agent. We placed a copy on the wall, by nailing it on the wall, a copy of the search warrant as well as a list of the property that was taken away in the trucks.

Q. Was that the same list as the list attached to Government Exhibit No. 1, now in evidence?

A. The list covers practically the same items. It may have been itemized in a different way, but they were practically the same.

Q. It wasn't the same, though, was it?

A. I would not say as to that. It was probably rewritten. I had no means of making several copies there, and we did the best we could.

[fol. 26] (Defendants' Exhibit No. "A" marked for identification.)

Q. Mr. Jarrett, I show you a paper marked Defendants' Exhibit "A," and ask if that is your signature on the back of that paper?

A. Yes, that is my signature.

Q. Mr. Jarrett, was this the paper or papers which you posted on the premises, or left on the premises, after the seizure?

A. They are.

Q. That is the original one as left?

A. Yes.

Mr. Bonsall: We offer in evidence Defendants' Exhibit "A" in connection with the testimony of this witness.

Q. Mr. Jarrett, you were one of the first officers to go into this building, were you not?

A. One of them, yes.

Q. When you went in there you saw a considerable number of barrels, didn't you?

A. I did.

Q. They were all used barrels, weren't they, or most of them were?

A. Partly, yes.

Q. Where were they piled in this case?

A. They were piled on the ground floor as we entered, in the back of the room, in the extreme back.

Q. How high were they piled?

A. Well, in feet I could not tell you.

Q. Well, say the number of barrels high?

[fol. 27] A. Probably four barrels high, around there.

Q. They were stood on end, weren't they?

A. Yes, sir.

Q. As far as you could see, all of them were stacked in that manner, were they not?

A. I think they were; yes.

Q. Mr. Jarrett, in pouring out the liquid that was in them, you poured it out through the bunghole, didn't you?

A. Yes.

Q. And the bungholes are in the side of the barrel, in the center of the barrel, are they not?

A. Yes, sir.

Q. So that in pouring out the liquid from each barrel, the barrel had to be taken down and turned on its side, and then tilted, so that whatever was in there would drain out through the bunghole, would it not?

A. Yes, sir.

Q. How many barrels were so drained by the agents, all of them?

A. To my knowledge, there were only two barrels from which any liquid was taken.

Q. Only two?

A. That is all I remember seeing.

Q. So that so far as you know, there was absolutely nothing in any of the other barrels except two, is that your statement?

A. No. In taking the barrels down, in some of them we could hear the liquid inside as the barrels were pulled down.

Q. Did you not drain that liquid out after you heard it moving around?

[fol. 28] A. No, sir.

Q. Is it still in the barrels in the warehouse, so far as you know?

A. So far as I know.

Q. It was in those barrels when they were put in the warehouse?

A. Yes, sir.

Q. And the barrels were stacked up in the corner about four barrels high at the end?

A. Yes.

Q. Of the barrels you drained, about how much liquid did you find in the barrels?

A. I do not know. One of the other agents drained the barrels, but I saw them in the act of so doing.

Q. Can you tell me who that agent was?

A. I do not remember.

Q. You were there, however, were you not?

A. Yes, sir.

Q. At what time was this seizure made?

A. About a quarter to three, I think, was the time we entered, in the afternoon—p. m.

Q. A quarter to three is what your return shows?

A. Yes.

Q. How long did you stay on the premises?

A. I stayed there until 3:00 or 3:30 a. m., the next morning.

Q. That is for about twelve hours?

A. Yes, practically.

Q. During that period you were there, were all of the barrels taken away?

A. Yes, sir.

[fol. 29] Q. So that any draining that as done on the premises was done while you were there?

A. Yes, sir.

Q. And you saw only two barrels that were drained while you were there?

A. That is my recollection. There may have been more. I do recall one, and at that time I think there was another one drained.

Q. And what do you say was the quantity in these barrels?

A. I do not know. I did not do the draining.

Q. What became of the liquid that was drained out?

A. Some of it was turned in as a sample and the rest of the seizure was sent to the warehouse.

Q. What kind of containers was that put in?

A. Put in bottles, either pint or half pint; I do not recall.

Q. So that a pint or half-pint bottle would contain all of the liquid that was drained out of the barrels?

A. The object of draining the barrels was to get an idea of the contents of the barrels as well as to get a sample of the liquid.

Q. Were any whisky chips—or so-called whisky chips—taken out of any barrel?

A. I do not know.

Q. Mr. Jarrett, the libel contains this, as part of the list of the articles libeled in this case: 402 empty whisky barrels, all containing whisky chips, and having strong odor of whisky, and more than half containing small quantity [fol. 30] of whisky.—But you say that while on the premises only one, or not more than two of these barrels were drained.

Mr. Richardson: Objected to as argumentative.

Objection sustained.

Q. Mr. Jarrett, I call your attention to the first item mentioned on your return, Defendants' Exhibit "A," which reads: "One 5-gallon jug whisky chips taken from barrel." Is that you found in the only barrel which you say you saw opened and drained?

A. I did not do the draining, so I cannot properly testify in regard to that.

Q. Mr. Jarrett, you were in charge, were you not?

A. No, sir; I was not.

Q. This search warrant was issued to you?

A. Yes, but Mr. Gettel took charge.

Q. You are the only agent to whom this search warrant was issued?

A. I think Mr. Gettel's name appears on this search warrant, if I am not mistaken.

Q. This search warrant is directed to you?

A. Yes, but Mr. Gettel took active charge.

Q. But you are the only one mentioned in the search warrant?

A. Yes, sir.

Q. Mr. Jarrett, you have already testified that you signed the return?

A. Yes, sir.

Q. And that nobody else did?

[fol. 31] The Court: The return shows who signed it. It speaks for itself. Why take up time with needless questions?

Q. Mr. Jarrett, did you and the agent serving this warrant which was issued to you, find a book or any books of account on the premises?

A. Yes; there were a lot of books there in the office and in the safe.

Q. In the safe?

A. Yes.

Q. Did you take those books and seize them?

A. The books were taken with the rest of the seizure, yes, sir.

Q. Have you any knowledge, or can you remember accurately, what the books were?

A. No; I do not.

Q. There were two large ledger account books, were there not?

A. I could not identify any of them.

Q. There was a small ledger account book?

A. I do not know.

Q. Do you remember, Mr. Jarrett, taking a life insurance policy on the life of Mr. Danovitz?

A. I think there was a policy of some sort taken. I do not know whether it was life insurance or not.

Q. Some such paper was taken?

A. Yes.

Q. Do you remember taking a check protector?

A. No; I do not remember that.

The Court: How are we interested in that? We can only [fol. 32] forfeit what the Government is asking to have forfeited. The lawfulness of the seizure is not determined by what is on the return.

Q. Mr. Jarrett, you stated that before you obtained the search warrant in this case you smelled an odor of moonshine liquor?

A. Yes, sir.

Q. Now, what do you mean by moonshine liquor? How does that differ from the odor of legal liquor?

A. Well, moonshine liquor, in my understanding, is illicit liquor. It is not whisky.

Q. You mean, illicitly made liquor, do you not?

A. Yes.

Q. And moonshine whisky is sometimes made by the same process as legally made liquor?

A. I do not know that.

Q. It might have, and sometimes does have, exactly the same smell as legal liquor?

A. It might.

Q. Do you realize that is the situation here?

A. It might be.

Q. So that when you made the affidavit for this search warrant, what you really meant was that you detected an odor of whisky?

A. It was a whisky or moonshine smell emanating from those premises, which I had noticed on several occasions when passing there.

Q. Was there a whisky smell?

A. Yes.

Q. Was there a moonshine smell different from the whiskey smell? Was it different, and how could it be different?

[fol. 33] The Court: Do I understand you are cross examining this witness from the basis of a search warrant? I do not understand you can cross examine this witness as to the testimony he gave before the Commissioner. This witness cannot be cross examined as to the testimony he gave before the Commissioner. This witness is to be interrogated as to the seizuse and to that point the cross examination should be confined.

Mr. Bonsall: May this be considered a part of the record, so that an exception may be taken?

The Court: State what you propose to ask this witness on cross examination.

Mr. Bonsall: Claimants intend to ask the witness on the stand, as a part of his cross examination, to state the facts which were in his possession before he made the affidavit for the search warrant which has been offered in evidence in this witness's testimony. For the purpose of showing that the affidavit was illegally obtained under the facts in the possession of the witness at that time.

Mr. Richardson: The offer is objected to as not proper cross examination.

[fol. 34] Objection sustained. Exception noted.

Q. Mr. Jarrett, when you went into these premises with this search warrant, could you smell any odor of whisky?

A. Yes, sir; I did.

Q. Could you smell any odor that you could definitely say was moonshine whisky as distinguished from legal whisky?

A. I do not understand the question.

The Court: This witness, as we recall it, did not testify as to smelling any whisky when he went onto this property. We are not concerned with that in this libel, it seems to me.

Mr. Bonsall: I ask that the question be read to the witness so that he can understand it.

(Preceding question read to the witness.)

Mr. Richardson: The question is objected to as not proper cross examination.

Objection sustained. Exception noted.

Redirect examination.

Mr. Richardson:

Q. Mr. Jarrett, what liquor besides that drained from the barrels was found in the place?

[fol. 35] A. There was some liquor found in a small room in which the stamps and labels and wrappers were located.

Q. How much?

A. Just a small quantity. It was in bottles.

Q. In bottles?

A. Yes, sir; and there was, it is my recollection, another container. I think it was a glass jug.

Q. What did it contain?

A. Contained whisky.

Q. What did it contain?

A. You mean the quantity?

Q. Yes.

A. I cannot recall. I did not find it.

Q. You found some liquid in this jug?

A. Yes.

Q. That was turned in to the Prohibition Office?

A. Yes, it was.

Recross-examination.

Mr. Bonsall:

Q. Mr. Jarrett, you say some bottles containing some quantity of liquor was found in the office, did you say?

A. Yes.

Q. In the small room in the front?

A. No, not in the office, in the room in the back, where the labels and stamps were.

Q. What kind of bottles were these?

[fol. 36] A. Colored glass bottles, pint and half-pint. I think they contained some liquid of the odor of gin.

Q. You do not know whether it was alcoholic?

A. Yes, I could tell by the smell, and I tasted it. I recognized the alcohol content in spite of the strong gin flavor.

Q. How many of these bottles were there?

A. I do not remember. Two or three, I think.

Q. Were they in a case, or anything like that?

A. They were sitting on the shelf if I recall correctly.

Q. Just by themselves?
A. Yes.
Q. Were they labeled?
A. No.
Q. And then you state there was a one-gallon jug containing some liquid?
A. I said just a glass jug. I do not know whether it was one gallon or not.
Q. Where was that found?
A. I do not know. One of the other agents found it.
Q. Was it full or only partly full?
A. It was partly full.

[fol. 37] TESTIMONY OF FRED WEINHEIMER

FRED WEINHEIMER, a witness produced on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Richardson:

Q. Mr. Weinheimer, you were a Prohibition Agent in May of this year?
A. Yes, sir.
Q. I believe you are out of the service now?
A. Yes, sir.
Q. Were you at the raid of the Prohibition Department on the Feitler Bottling Company?
A. I was.

(Government's Exhibits 6 and 7 marked for identification.)

Q. I show you Government's Exhibits 2 and 3, and 6 and 7, and I ask you to look at them and ask you to tell us, if you know, what they are.
A. Government Exhibit No. 2 and Exhibit No. 3 I took from either the desk or the safe in the office of the Feitler Bottling Company. I took a special interest to look at these price lists when we were taking the evidence up.
Q. And Exhibit 6, what is that?

A. Exhibit 6 is a letter dated February 28—It is practically the same as the others—relates to the sale of labels.

Q. Where did you get it?

[fol. 38] A. Out of the desk or the safe. It was in the office of the Feitler Bottling Company.

Q. Did you see Government Exhibit No. 7 on that day, which purports to be a series of letters and bills?

A. Yes, sir.

Q. Where were they?

A. They were in either the desk or safe, one or the other.

Q. And they were taken at the time of this raid?

A. They were taken at the time of this raid.

(Government Exhibits Nos. 8 and 9 marked for identification.)

Q. I show you, Mr. Weinheimer, Government Exhibit No. 8, and ask you if you know what that is.

A. This is one of the samples which was drained from a 50-gallon barrel into a 5-gallon bottle, and in turn part of it was drained into a pint bottle and turned over to the Prohibition Department for evidence.

Q. I show you Government Exhibit No. 9 and ask you what that is?

A. One of the Prohibition Agents came later, about 8:00 p. m. that night, and in the rear he found a salesman's case, with a five-gallon bottle partly filled with whisky chips. Part of this was drained into a bottle.

Q. Did you see where he found it?

A. Yes, he called my attention to it and I went over and saw it.

Mr. Richardson: We offer in evidence Government Exhibits 2, 3, 6 and 7.

[fol. 39] Mr. Pyle: Defendants object to the introduction of Exhibit No. 2, for the reason that same is incompetent, irrelevant and immaterial, has no probative value in this case, and is in no manner binding upon the defendants; and for the further reason that the same was improperly and illegally seized, by virtue of a search warrant which did not authorize the seizure of any commodity such as this.

Defendants object to the introduction of Exhibit No. 3 in evidence, for the reasons cited for Exhibit No. 2.

Defendants object to the introduction of Exhibit No. 6, for the reason that same is incompetent, irrelevant and immaterial, and is not binding in any manner on the defendants, has no probative value in this case, is in no manner binding on the defendants, and for the further reason that the same was improperly and illegally seized, by virtue of a search warrant which did not authorize the seizure of any such document.

The same objection is made to the group of papers marked Government Exhibit No. 7.

Objection overruled. Exception noted to defendants.

(Government Exhibit No. 10 marked for identification.)

Q. I show you, Mr. Weinheimer, Government Exhibit No. 10, which consists of a booklet, four statements and a letter, and ask you if you know what they are.

[fol. 40] A. Yes, sir; I remember going over these statements out there at the time of the raid.

Q. Where were they found?

A. Either in the desk or in the safe.

Q. On the day of the raid?

A. Yes.

Q. By whom?

A. By myself.

Mr. Richardson: We offer in evidence Government Exhibit No. 10.

Mr. Pyle: Defendants object to Government Exhibit No. 10, as incompetent, irrelevant and immaterial, and as having no probative value, and for the second reason, that the same was illegally seized, in violation of the law and the constitutional rights of the defendants.

Objection overruled. Exception noted to defendants.

Adjourned until 1:30 o'clock p. m.

Afternoon Session

Fred Weinheimer—Resumed

Fred Weinheimer, resumes the stand.

(Cross-examination waived.)

[fol. 41] TESTIMONY OF SAMUEL G. EISLER

SAMUEL G. EISLER, a witness produced on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Richardson:

Q. Mr. Eisler, you are a probihition agent?
A. Yes, sir.
Q. And were such on May 10, 1928?
A. Yes, sir.
Q. Were you with the other agents at 1026 Watson street, on that date?
A. Yes, sir.
Q. Tell the Court briefly the facts, so far as you know them.
A. I was sent to the front of the building or the office on Forbes in company with Officer Pindro. The other agents went around on Watson street, served the warrant, and then opened the front door and let Agent Pindro and I in. We then helped to conduct a survey for illicit whisky and anything else we could find. The first floor, where the first seizure was found, was a large room divided by a partition.
Q. How did this partition run, crosswise or lengthwise?
A. The length of the building. In this big room, about half way back, I found a cardboad carton with different compartments in it. It was filled with strip stamps, approximately 18,000 strip stamps in this box.
[fol. 42] Q. What kind of stamps were there, Mr. Eisler?
A. There were stamps from different distilleries. They had different distillers' names on them, some American and some Canadian.
Q. I show you Government Exhibit No. 5, and ask you to examine it, and tell us if the stamps contained therein are some of the ones you found?
A. They are.
Q. Your initials are on them?
A. Yes, sir.
Q. What was in other parts of this building?

A. Well, all over the downstairs, the ground floor, was practically the same thing. There was such a large amount they were scattered all over the place.

Q. Did there seem to be any system to the place?

A. Yes, as far as the cartons of bottles were concerned; they were piled up there.

Q. Where were they?

A. They were piled on both sides, but the majority were on the right, on the same side as I found the stamps.

Q. Where were the barrels?

A. They were on the left, at the extreme right end.

Q. At the extreme right end?

A. Yes.

Q. Was there any machinery in the building?

A. I did not see any.

Q. Were Mr. Danovitz and Mr. Feitler there?

A. Yes.

Q. Where were they?

A. They were in the office when I saw them.

[fol. 43] Q. Where is the office?

A. In front.

Q. Are there any big doors to that building?

A. There are two big doors.

Q. From Watson street?

A. Yes.

Q. What kind of door is on Forbes street?

A. There is a big door there, and a small door. The big door apparently has been unopened for quite a long time.

Q. That is the door on Forbes street?

A. Yes, sir.

Q. Was there anything against it?

A. No, sir. It just seemed to indicate that it had not been opened for a long time. It sort of stuck.

Q. It was not open?

A. No.

Q. Did you drain any whisky from the barrels?

A. I helped, yes.

Q. About how much whisky did you obtain?

A. We drained approximately eight gallons from the barrels, but only five gallons of it was turned in. We used a big funnel in draining this whisky from the bung of the

barrel into the bottle, and we spilled quite a lot. We brought some of it into the warehouse.

Q. You took samples?

A. Yes, sir.

Q. I show you Government Exhibits 8 and 9, and ask you if you know what they are?

A. Exhibit No. 8 is a sample of whiskey taken from a barrel on the first floor.

Q. And Exhibit 9?

[fol. 44] A. Exhibit 9 is a sample taken from a bottle on the first floor. It was found in the salesman's case. I saw it afterwards, but I did not see it found.

Q. Mr. Eisler, these bottles you speak of, were these bottles two of the bottles you found?

A. They were taken on the premises, yes, sir.

Q. Were the other bottles similar to this?

A. Yes, pints and half-pints. Most of the bottles—There were quite a number of cartons of bottles that had labels of whisky on them.

Q. What about gin bottles?

A. There was quite a number of them.

Q. What shape are they?

A. They are square, I think what they call the fifth size?

Q. What did you do with the samples?

A. I initialed them and turned them into the office.

Q. You know they were turned in?

A. Yes, sir.

Cross-examination.

Mr. Pyle:

Q. There were a quite a number of barrels on the premises?

A. Yes, sir.

Q. The liquid you helped to drain came out of quite a number of barrels?

A. No, this liquor I drained all came out of one barrel.

Q. Was that turned into the office?

[fol. 45] A. Yes, sir.

Q. Was it washed or not?

A. It was not. It was turned in as whisky.

Q. Just as it came out of the barrel?

A. Yes, sir.

Q. These barrels you describe in there, did they have the bungs in or out?

A. Some had bungs in and some didn't. They were all full of whisky chips.

Q. All?

A. All that I saw, and that was over a hundred of them.

Q. What do you mean by whisky chips?

A. Shavings from the inside of the whisky barrel.

Q. Now, this you mentioned as coming from a barrel on the first floor, that means from a barrel on the first floor, I take it?

A. Yes, sir.

Q. All this material was taken out on this raid?

A. As far as I know. I left there about seven o'clock in the evening.

Q. You didn't stay all the time?

A. I wasn't there until the place was finished.

Q. These barrels that were stacked up there were all empty, or substantially empty, barrels?

A. With the exception of the whisky chips and some that had liquor in them.

Q. But a very small quantity?

A. I would not say that.

Q. Well, the liquid, you would say they were all leavings, what was left in when the barrel had been emptied?

[fol. 46] A. No, I do not think so. Most of them were full of whisky chips. They were new barrels, a good many of them.

Q. What color were they—yellow?

A. No, not yellow.

Q. Were they white?

A. No, but they were not all used barrels.

Q. How many new barrels would you say there were?

A. Possibly half of them.

Q. Half new unused barrels?

A. Yes, sir.

Redirect examination.

Mr. Richardson:

Q. Mr. Eisler, you have had some experience with chips in whisky barrels?

A. Yes, sir.

Q. Tell the Court the function of the chips in the whisky barrels.

Mr. Pyle: Objected to as irrelevant and immaterial, and calling for a conclusion on the part of the witness.

Objection overruled. Exception noted to defendants.

A. These whisky barrels that have the chips in them can be used for making alcohol or moonshine whisky, sometimes by placing distilled water into the barrel and letting it remain there for a given length of time, and then you take the bung out, you drain it out, and you have pretty [fol. 47] good whisky, because these chips are soaked. They may apparently be dry at the time, but there is still whisky in the chips.

Recross-examination.

Mr. Pyle:

Q. Now, Mr. Eisler, how often can that process be repeated from the same chips and still manufacture whisky?

A. Possibly two or three times.

Q. You think it could be done two or three times and still make whisky?

A. Yes, sir.

Q. Can you tell me from any indications you saw on these premises how many times these barrels or chips had been used?

A. No, sir.

Testimony of H. E. Blakesley

H. E. Blakesley, a witness produced on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Richardson:

Q. Mr. Blakesley, you are a chemist in the Internal Revenue Department?

[fol. 48] A. In the Prohibition Department.

Q. In the Prohibition Department, working under the Administrator here?

A. Yes, sir.

Q. I hand you Government Exhibits Nos. 8 and 9, and ask you if you have made an analysis of the contents of the bottles?

A. Yes, sir; I have.

Q. When did you make that analysis?

A. I made the analysis on the 10th day of September of this year.

Mr. Bonsall: It was agreed that we were to receive samples of everything that was offered in evidence, and I would like to know what is the chemical analysis of these two samples. Testimony with regard to these samples is objected to, unless it is shown that defendants have been given samples of the same liquids.

Objection overruled. Exception noted to defendants.

Q. What does that analysis show?

A. Sample marked 21,886 is artifically colored distilled spirits, contain 16.2 per cent alcohol by volume.

Q. Sample No. 21,886 is Government Exhibit No. what?

A. Exhibit 9.

Q. And what is Exhibit No. 8?

A. The second sample, marked Government Exhibit No. 8, laboratory No. 21,887, is artificially colored distilled [fol. 49] spirits, containing 44.4 per cent alcohol by volume.

Q. Are these liquids fit for beverage purposes?

A. They are.

Mr. Richardson: Now, if your Honor please, I have three samples here which I am told are samples part of which were given to the respondents in this case. While they are not in the case, I am perfectly willing to submit them to the chemist to see if he has analyzed them.

Mr. Bonsall: I move the adjournment of this case, until we can have a chemical analysis made of all these samples, to determine whether or not the respondents have been furnished with samples of the liquids offered in evidence.

The Court: We will hear the balance of the case, but we will permit you to take samples of these liquids, and you can have your chemist testify as to that later.

Q. Mr. Blakesley, did you examine a bottle marked No. 22,483?

A. Yes, sir.

Q. Do you know what the bottle, which I am producing before you now is? Is it the sample I have described?

A. Yes; it is sample 22,483.

[fol. 50] Q. Did you analyze that sample?

A. Yes, sir.

Q. Can you state its alcoholic content?

A. The alcoholic content of this sample is 16.2 per cent alcohol by volume.

Q. Is it fit for beverage purposes?

A. Yes, sir.

Q. Did you examine a bottle marked 22,482?

A. Yes, sir.

Q. Do you know if the bottle I am now handing you is the sample which you have analyzed?

A. Yes, sir.

Q. Can you state its alcoholic content?

A. Sample No. 22,482 has an alcoholic content of 44.65 per cent alcohol by volume.

Q. Is it fit for beverage purposes?

A. Yes, sir.

Q. I hand you a bottle marked sample 22,481, and ask you if you have made an analysis of that sample?

A. Yes, sir.

Q. Can you state its alcoholic content?

A. Sample No. 22,481 has an alcoholic content of 44.4 per cent alcohol by volume.

Q. Is it fit for beverage purposes?

A. Yes, sir.

Q. Do you know, Mr. Blakesley, whether the three samples I have just shown you are parts of samples which were turned into your laboratory of which other parts were given to Mr. Bonsall, or any of the respondents in this case, do you know?

A. Only from having heard.

Q. All right, tell us what you have heard.

[fol. 51] A. I was told these were duplicate samples of samples given defendants for analysis by their chemists.

Mr. Bonsall:

Q. The numbers given to Mr. Buckmeister, our chemist, do not correspond to the numbers which you mention. The three numbers which were given to Mr. Buchmeister were No. 1388, 1389 and 1390. Are they on your bottles?

A. I do not know what your numbers refer to. The numbers I mentioned are simply laboratory serial numbers.

Mr. Richardson: I offer in evidence samples marked Government's Exhibits 8 and 9 and ask leave to call witnesses to show the taking of the three samples which have not been offered.

By the Court: They are admitted.

Cross-examination.

Mr. Bonsall:

Q. There are three numbers here, 22481, 22482 and 22483. Did you give the alcoholic content of all of these?

A. Yes, sir.

Q. What were the alcoholic contents, again?

A. Sample No. 22481 has an alcoholic content of 44.4% [fol. 52] alcohol by volume; sample No. 22482 has a content of 44.65% alcohol by volume and sample No. 22483 has a content of 16.2% alcohol by volume.

Q. How large an alcoholic content has whisky?

Mr. Richardson: Objected to as incompetent, irrelevant and immaterial, and not proper cross examination.

Objection sustained. Exception noted to defendants.

Q. You have testified, I believe, that all three samples were fit for beverage purposes?

A. Yes, sir.

Q. You are a chemist and stating that as a chemist expert?

A. Yes.

Q. What do you mean when you state they are fit for beverage purposes?

A. Fit for drinking. From testing or analysis I judge them to be fit for beverage purposes.

Q. Do you think this sample No. 22481 is fit to be drunk?

A. Yes, sir. The black color I judge to be charcoal and I do not think it would hurt any person.

Q. Just as it is, you testify, it is fit to be drunk?
A. Yes, sir.
Q. And the same with the others?
A. Yes, sir.

Mr. Richardson: I find, your Honor, that what happened to the three samples is this; that the whiskey was taken to [fol. 53] the warehouse and that Agent Leath took these samples and the three for Mr. Bonsall. Mr. Leath is not here and I cannot, therefore, offer these three samples in evidence, but I do want to state that I am not afraid to call Mr. Leath.

Mr. Bonsall: I think we are entitled to know something as to the circumstances of the finding of the liquor in the barrels. They are not described sufficiently to enable us to identify them.

Government rests.

Mr. Pyle: At this time respondents ask the Court to direct the return of the property described in this action, for the reason that the Government has not proven or attempted to prove that the commodity seized was designed for the manufacture of intoxicating liquor. They made some effort to show it was usable but no effort has been made to show that is for what it was designed.

By the Court: There is some evidence here that speaks pretty strongly. The strip stamps and the labels found there and different kinds of stamps for whiskey manufacture; all of these thing are strong items from which you can draw a very strong inference as to what was carried on at this place. The design might be drawn from the fact that they had printed labels and stamps and different ma- [fol. 54] terials to go on different types of distilled whisky. I am of the opinion that *that* Government has made out a prima facie case.

Exception noted to respondents.

Defendants' Case

Testimony of Ike Danovitz

Ike Danovitz, a witness produced on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

Mr. Pyle:

Q. Mr. Danovitz, you are one of the partners in the business known as the Feitler Bottling Company?

A. Yes, sir.

Q. Part owner?

A. Yes, sir.

Q. What is your business, Mr. Danovitz?

A. In the barrel business.

Q. How long have you been engaged in that business?

A. Sixteen years.

Q. What do you mean by "barrel" business?

A. I am buying and selling second hand barrels.

Q. Where do you keep your stock of barrels—you keep your barrels at the Feitler warehouse?

[fol. 55] A. Yes, sir.

Q. It has been testified to here that on May 10th a large number of barrels were seized, empty barrels or partially empty barrels were seized on the premises at the Feitler Bottling Company on Watson street. Will you describe what those barrels were on those premises; what they were and how they got there.

A. I buy barrels anybody brings over to me, one, two or three at a time; the ragman, the express man, anybody brings them to me.

Q. What do you do with them?

A. Sell to the bigger barrel men and get a bigger price for them.

Q. What do you do with the barrels while they are in your possession?

A. I do not do anything. I am a very small dealer. The big barrel man puts in a new stave and fixes them up and resells them.

Q. It has been testified to that some of these barrels had whiskey chips in them and these whiskey chips were later

described as shavings from the inside of the barrel. What do you know about that?

A. I do not know anything about that. I was buying barrels, one or two from whoever brought them to me.

Q. Did or not some of these barrels that you bought contain whiskey chips?

A. I do not know anything about that. I did not open the barrels.

Q. You did not open the barrels?

A. No, sir.

Q. It has been testified to here that some of these barrels [fol. 56] had some liquor in them. What do you know about that?

A. I do not know anything about that except put water in there and washed it out it would be whiskey.

Q. There is whiskey soaked into the charcoal?

A. Yes.

Q. Is it my understanding that an empty whiskey barrel is not absolutely empty but that a small quantity of whiskey will be in it?

A. I can only say you can take whiskey barrels and drain them out and if you put some water in them you would be able to get whiskey for ten or fifteen years.

Q. Did you ever take any whiskey out of any of these barrels?

A. I never did. I never tried to do that.

Cross-examination.

Mr. Richardson:

Q. Do I understand, Mr. Danovitz, that you are a partner in the Feitler Bottle Company?

A. Yes, sir.

Q. And were on May 10th, 1928?

A. Yes, sir.

Q. And you confined your end of the business to buying and selling second-hand barrels?

A. Yes, sir.

Q. Who handled the other end of it?

A. Mr. Feitler.

Q. You bought the barrels and he handled the bottle end of it?

[fol. 57] A. Yes.
Q. And you were partners in the whole enterprise?
A. Partners who rented the building.
Q. Then you were not a partner of the Feitler Bottle Company?
A. Yes.
Q. And you were selling bottles and the like?
A. I never did.
Q. You were a partner in the business?
A. But I never had anything to do with bottles.
Q. What was your share in this business?
A. Half.
Q. How long had you been a partner?
A. About a year and a half.
Q. You were a partner all during 1928?
A. Yes.
Q. Do you know anything about amber flasks?
A. Yes, I know something about it, sure.

Mr. Pyle: Objected to as not proper cross-examination.
By the Court: He has admitted he was a partner.

Objection overruled.

Q. From whom did you purchase these barrels?
A. Anybody who brings them in.
Q. Who, in particular?
A. Particularly the ragman.
Q. How many would you buy at a time?
A. Two, three, five.
[fol. 58] Q. Did you ever buy a carload of them?
A. No, sir.
Q. The most barrels you bought at any one time was five?
A. Sometimes twenty.
Q. From whom would you buy them?
A. From the ragman.
Q. Tell us one customer you bought from?
A. If I see them I could tell them.
Q. How did you pay them?
A. All cash.
Q. You did not issue any checks?
A. No, sir.
Q. How long have you been doing that?
A. Since I was with Mr. Feitler in the business.

Q. About a year and a half, then?
A. Yes.
Q. Who did you sell to?
A. Northside Cooperage Company.
Q. Who else?
A. That is the most.
Q. In the past year and a half how many barrels have you sold to the North Side Cooperage Company?
A. I cannot tell exactly.
Q. About how many?
A. Fifty, thirty, forty—all small quantities.
Q. How many have you sold in the last year and a half?
A. I do not know; I could not tell you.
Q. 500?
A. 500 or more.
Q. Is that your largest customer?
[fol. 59] A. Yes, sir.
Q. You never opened these barrels?
A. No, sir.
Q. And you did not know what was in them; you did not know anything about the whiskey chips?
A. You could see through the bung that there was whiskey in them.
Q. You didn't buy any other kinds of barrels; nothing but whiskey barrels?
A. Yes, oil barrels; sugar barrels; vinegar barrels.
Q. Where did you buy your oil barrels?
A. Mostly from the ragman.
Q. Where did you keep your oil and vinegar barrels?
A. They are a very cheap barrel—50¢ and I sell them right away.
Q. Where did you keep the ones you did not sell?
A. Down in that place.
Q. The barrels that were there on May 10th were all whiskey barrels?
A. Yes.
Q. Mr. Lubitz—where does he live?
A. I do not know.
Q. How many did you sell him?
A. Him?
Q. How many barrels did you sell on May 10th?
A. I do not know. Whenever I get barrels I sell them every day.

Q. So you had sold everything but the whiskey barrels before the agents got there?

A. Yes.

[fol. 60] Q. How many barrels, oil barrels were on hand before the agents got there?

A. I don't know. I still have them.

Q. They were all in good shape were they?

A. Yes.

Q. No. 1?

A. I don't know whether they were No. 1 or No. 2.

Q. You get a good price from them?

A. Yes, sir.

Q. What use did the Feitler Bottle Company make of the barrels?

A. They bought and sold them.

Q. What did they do with the bottles that were there?

A. Buying and selling, I suppose.

Q. You suppose?

A. Yes, we did not do anything but buying and selling.

Q. You never drained any barrels?

A. Not that I know of.

Q. You did not see any five-gallon glass jugs around there?

A. Plenty of them.

Q. What was in them?

A. Empty ones.

Q. You didn't see a five-gallon jug with whiskey in it?

A. No, sir.

[fol. 61] TESTIMONY OF MANFRED FEITLER

MANFRED FEITLER, a witness produced on behalf of the defendants, having been duly sworn, testified as follows:

Direct examination.

Mr. Pyle:

Q. Mr. Feitler, you are part owner of the business of the Feitler Bottle Company, doing business on Watson street?

A. Yes, sir.

Q. What is the nature of that business, Mr. Feitler? Is it manufacturing, retail business, wholesale?

A. Wholesale and retailing of bottles and barrels.

Q. According to the libel filed in this action there were also some five gallon cans on the premises. Did you handle them?

A. Yes, sir.

Q. What did you do with them?

A. Sold them.

Q. And about the empty bottles, what did you do with them?

A. Sold them.

Q. Empty jugs, what did you do with them?

A. Sold them.

Q. Ten-gallon empty can, what did you do with that?

A. Ten-gallon empty cans, we didn't have any.

[fol. 62] Q. The libel in this case mentions a great many items, including those I have mentioned and 5-gallon crocks, 25-gallon empty can, boxes of gin bottle caps, cartons empty pint bottles, bundles cardboard cartons, 5-gallon demijohns empty, box bottle caps, bundles of small flat pieces cardboard, bundles of paper, cartons of half-pint bottles, carton quart bottles, cartons gin bottles, cans glyco, case 2-ounce bottles, cases of quart bottles, cases of bottles in paper cases, packages flat empty cardboard cartons, trunks empty bottles, barrels partly full of bottles, cases partly full of bottles, bundles paper cartons, bundles carboard fillers, bags of corks, boxes of corks, box of sealing wire, boxes wrappers for whiskey bottles, bags of cartons for bottles, five-gallon can, cartons for whiskey bottles, box of twine, boxes paper wrappers for whiskey bottles, boxes cans for bottles, box cardboard bottle separators, bundles paper bags, crimping machines, labeling machines, siphons and filters, box assorted whiskey labels, box flavoring nuts, cases glycerine, case gin extract, gallons syrup, paper roll holder, cans Viscose caps, large wood case corks, 5-gallon cans glycerine, roll of paper, box wrappers for bottles, bundles tissue wrappers, bundles bottle cartons, bundles heavy wrapping paper, boxes bottle cartons, bundle paper bags, bundles paper wrappers, boxes bottle cartons; what were you or your

partner in the Feitler Bottle Company, doing with these commodities?

A. Buying and selling. It is an open business, with doors wide open.

Q. How long have you been in that business?

A. In the bottle business?

[fol. 63] Q. Yes.

A. Since March, 1927.

Q. Mr. Feitler, at the time of the execution of the search warrant which has been introduced into evidence in this case, you were present at the place searched on Watson street?

A. Yes, sir.

Q. In addition to the articles which were listed on the search warrant as having been taken, were there other articles taken from your place of business other than those listed and on the return?

A. Yes, sir.

Q. How about the books and papers of the concern?

A. Yes, sir. The ledger—another kind of ledger and a small ledger was taken.

Q. What other matters, in the nature of books, papers and records that you can recall at this time, were taken at this time?

A. Bills, letters, everything.

Q. Any bank records?

A. Yes, bank records.

Q. Insurance policy?

A. I think it was taken.

Q. Any office equipment taken?

A. Yes, sir.

Mr. Richardson: What is the purpose of this?

Mr. Pyle: The Court indicated this morning we should [fol. 64] prove by our own witnesses the taking of other articles.

Mr. Richardson: With the exception of the books and bank records, have not these things all been returned?

Mr. Pyle: Not to this party.

(Witness, continuing): There was a hand truck, and a larger truck; there were quite a lot of things.

Q. What else do you recall?

A. Oh, I cannot remember. There were many, many things.

Q. The Answer in this case calls attention to a number of items in addition to the articles heretofore mentioned; among other things, a typewriter. That was given back?

A. Yes.

Q. A life insurance policy, was that returned?

A. I do not think.

Q. Receipt for $1500, cash bail, receipt of United States Marshal; was that returned?

A. No, sir.

Q. Postage stamps and stamped envelopes; were they returned?

A. No, sir.

Q. Writing paper?

A. No.

Q. Ink?

[fol. 65] A. No.

Q. Carbon paper?

A. No.

Q. Files from the safe?

A. No, sir.

Q. Files from the wall?

A. Yes.

Q. Two special ledgers, have they been returned that you know of?

A. No, the ledgers have not been returned.

Q. And you say there were a number of other small articles taken and not returned?

A. Yes.

Q. And they were not listed on the return of the Search Warrant furnished you?

A. No.

Cross-examination.

Mr. Richardson:

Q. Mr. Feitler, is it not a fact that with the exception of your books, all of this stuff was returned to your premises by the Prohibition Agents?

A. No, sir.

Q. Have you been out there recently?

A. Out where?

Q. Haven't your truck and your insurance policy been returned to you?

A. No, sir.

Q. Now, Mr. Feitler, did you have on hand any empty bottles with whiskey labels?

A. Very likely.

[fol. 66] Q. Did you?

A. I suppose.

Q. Did you—yes or no?

A. Yes.

Q. Did you have any loose whiskey labels on hand?

A. Yes, sir.

Q. Did you have any strip labels on hand?

Mr. Pyle: Objected to as immaterial and irrelevant. The Court ruled this morning that the testimony would be confined to matters mentioned in the libel.

(Question withdrawn.)

Q. You have been carrying on business there for a year and a half?

A. In this place since the first of the year.

Q. And you have bought a good many bottles for use in your business?

A. Yes.

Q. And you buy a good many bottles known in the trade as Gordon gin bottles?

A. Yes, sir.

Q. And you bought a good many bottles known in the trade as whiskey bottles?

A. Whiskey bottles?

Q. Yes.

A. They are not known as whiskey bottles.

Q. What are they called?

A. They are known by the size.

Q. What do you call them?

A. Pints, half-pints.

[fol. 67] Q. You do buy Johnny Walker bottles?

A. There is a certain kind of bottle we have calls for. The Olds Bottle Company make these bottles. They are the largest bottle manufacturers in the world.

Q. You buy most of your bottles from Rup Brothers?

A. No, sir.

Q. You bought bottles from them in January?

A. We buy them every day.

Q. And you ordered them as Johnny Walker Bottles?

A. We do not order them that way.

Q. What kind of bottles did you order when the bill was made out, "Johnny Walker" bottles?

A. We always order by the size.

Q. Did you receive any bottles from Rup Brothers in January, 1928?

A. I presume we did.

Q. Do you ever buy any gin bottles?

A. I do not call them gin bottles.

Q. What do you call them?

A. Ovals.

Q. What do you use them for?

A. We sell them. We do not make use of any bottles, but we sell them.

Q. Do you have a wholesale or a retail trade?

A. Both.

Q. Would you sell your whiskey bottles or gin bottles to the wholesale or retail trade?

A. What do you mean by whiskey bottles?

Q. Pints and half-pints.

A. We do not call them whiskey bottles.

[fol. 68] Q. I did not ask you what you called them, but to whom did you sell them?

A. To anybody that wants to buy them.

Q. Who did you sell your gin bottles to, the ovals?

A. To anybody who wants to buy them.

Q. During the last year to whom did you sell the most of your gin bottles?

A. There are not so many; they buy two, five, three, ten dozen.

Q. Your largest sale would be ten dozen?

A. No. I sold them to anybody who needs them.

Q. Tell us the largest sale you had in 1928 that you can recall.

A. I should judge about 25 dozen; I cannot recall just now.

Q. Can you recall any of your customers?

A. No; in fact, there are a lot of people I do not know except by sight.

Q. Can't you recall any of your customers?

A. Yes, there is a hardware dealer, Minch Memore; they handle all kinds of bottles. They are out on Station street. Most of the people who buy bottles from me come in and get them and do not ask any questions and most of them pay cash for them.

Q. Who buys whiskey labels from you?

Mr. Pyle: Objected to as being outside of the scope of the libel.

(Question withdrawn.)

Q. Who buys whiskey bottles with labels attached?

[fol. 69] A. We buy them second hand.

Q. That is, you buy and sell cases of second hand whiskey bottles?

A. Sometimes.

Q. With labels on?

A. Yes.

Q. How many cases of whiskey bottles with labels on did you have this day?

A. I do not know.

Q. But you had some?

A. Yes, because we would want to have them when somebody came for some.

Q. The whiskey bottles with labels on are second hand?

A. Yes.

Q. You are sure of that?

A. Sure.

Q. You would not have any new bottles with labels on?

A. I don't see how they would get on.

Q. Well, did you or didn't you?

A. I don't know.

Q. These barrels, Mr. Feitler, what kind were they?

A. Whiskey barrels.

Q. Whiskey barrels—they were all whiskey barrels, were they?

A. Yes.

Q. What did you do with them?

A. I didn't have charge of them, but I can tell you what was done with them.

Q. What was done with them?

[fol. 70] A. They were sold.

Q. What for?

A. I do not know what they were used for.

Q. However, you did file a motion in this case to have these barrels returned to you, is that not correct?

A. Yes, sir.

Q. Is it not a fact that you told the Court in that Motion that you used these barrels for a particular purpose?

A. I do not know anything about that.

Q. For what purpose did you use these whiskey barrels?

A. We did not use them at all; we sold them.

Q. What did you sell them for?

A. To whoever wants to buy them.

Q. Is there any particular season when whiskey barrels are in demand?

A. I do not know. I haven't paid that much attention to the barrel business. There are certain times they are higher and sometimes they are lower; sometimes there are too many on the market and they are lower and when they get scarce they are higher.

Q. Is it not a fact that you filed a motion in this case, saying that you hold these barrels for sale during the fruit season?

A. I do not remember.

Q. Mr. Feitler, I show you the affidavit filed by you at this number and term and call your attention to this statement in Paragraph 3, "Claimants hold their stock of barrels for sale during the fruit season, the price obtainable being highest at that time, and claimants will lose much money unless they are able to make deliveries of barrels in [fol. 71] August and the months immediately following that month." Is that statement correct?

Mr. Pyle: Objected to as incompetent, irrelevant and immaterial and as improper cross examination.

Objection overruled.

A. I signed it, yes.

Q. Did you see it; did you know what you were signing?

A. I did not quite get that when I signed it.

Q. You did not know what you were signing?

A. I did not quite get it.

Q. Is that true of the rest of the affidavit?

A. I remember reading the affidavit.

Q. You told your counsel what to put in that affidavit?

A. Yes.

Q. And you told him they used these barrels during the fruit season, is that right?

A. I cannot quite remember that paragraph in there.

Q. That is your signature, isn't it?

A. Yes.

Q. That is the paper you signed?

A. Yes

Q. Is it true, Mr. Feitler, that you sell whiskey barrels for use in shipping fruit?

A. No, we do not sell them to those kind of people at all; we sell them to barrel dealers.

Respondents rest.

[fol. 72] REBUTTAL

TESTIMONY OF FREDERICK C. BUCKMASTER

FREDERICK C. BUCKMASTER, a witness called on behalf of the Government, having been duly sworn, testified as follows:

Direct examination.

Mr. Richardson:

Q. Mr. Buckmaster, you, I believe, were employed by the respondents in this case?

A. I was retained by Mr. Bonsall to obtain some samples from the Prohibition Department and to make an analysis of those samples.

Q. Did you obtain those samples?

A. I did.

Q. You are a chemist of the City of Pittsburgh?

A. No, I am chemist for Allegheny County and Armstrong County.

Q. But you reside in Pittsburgh?

A. Yes, I have resided here for a good many years.

Q. Mr. Buckmaster, I believe at the time you obtained your samples, you split with the men at the warehouse?

A. There were six bottles altogether; they were down in the House Building and I took them in the presence of

counsel. I mixed up the bottles and then took three of them and initialed them.

[fol. 73] Q. Just tell us, Mr. Buckmaster, the result of your analysis?

A. I found the first sample, which I see is labeled "U. S. No. 1, June 25, 1928——"

Mr. Pyle: Objected to.

By the Court: If there is any objection to this testimony being introduced on rebuttal, we shall have to sustain it.

Testimony closed.

Mr. Pyle: At this time respondents desire to renew motion made at the close of the Government's case. The situation the Court called attention to at that time has been explained and there is absolutely nothing here to prove any unlawful design on the part of respondents.

Motion denied.

IN UNITED STATES DISTRICT COURT

ORDER FOR DECREE

This case having come on to be heard on the Libel filed by the United States, and answer of Manfred Feitler and Ike Danovitz, on due consideration thereof the Court does now find that the allegations of fact contained in the Libel have been sustained by the Libel, Answer and Proof and [fol. 74] that the Government is entitled to a decree of forfeiture. Let one be prepared and submitted.

Per Curiam.

S.

Certificate of official reporter omitted in printing.

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF TRIAL JUDGE

I, Frederic P. Schoonmaker, Judge of the District Court of the United States for the Western District of Pennsyl-

vania, do hereby certify that the foregoing is a true transcript of all the evidence, offers of counsel, objections thereto, rulings of the Court thereon and exceptions thereto, in the case of United States vs. Contraband Liquors, etc., No. P-536, Law; all of which so certified, is [fol. 75] ordered to be filed and to become a part of the record this 12th day of December, 1928, at Pittsburgh, Pennsylvania.

F. P. Schoonmaker, Trial Judge.

GOVERNMENT EXHIBIT No. 1

Affidavit for Search Warrant

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

On this — day of ——, A. D. 1928, before me, Roger Knox, a United States Commissioner in and for the Western District of Pennsylvania, personally appeared H. G. Jarrett and O. Gettel, Federal Prohibition Agents who being duly sworn depose and say:

That they have good reason to believe and do believe that in and upon certain premises within the Western District of Pennsylvania, to wit, the premises of Three story brick building, used as warehouse, 1026 Watson St., Pittsburgh, Pa., there have been and are now located and concealed intoxicating liquors (or property for the manufacture of intoxicating liquors) which said liquors (or property) are being sold and possessed for beverage purpose in violation of the National Prohibition Act and of the Statutes of the United States.

[fol. 76] That the facts tending to establish the grounds of this application, and the probable cause of affiant's believing that such facts exist, are as follows:

That H. G. Garrett & O. Gettel aver that on or about the 10th day of May, 1928, at about the hour of 9:30 A. M., they detected a strong odor of moonshine whiskey emanating from the above described premises, this odor being detected at a distance of about seventy-five feet. That on May 9th, 1928, at about 9:00 P. M., Agent Jarrett made an investigation and detected a very strong odor of moon-

shine whiskey emanating from the above premises; that Agent Jarrett has had these premises under observation for a period of ten days; during this time he saw cars with West Virginia and Ohio license plates going to and from this place; that he saw about 100 five gallon cans in this building, the door of which was open, (such five gallons as used for conveying moonshine whiskey by bootleggers).

Wherefore your affiant prays that a Search Warrant may issue authorizing a search of the aforesaid premises in the manner provided by law.

H G. Jarrett, O. Gettel.

Sworn to and subscribed before me this 10 Day of May, 1928. Roger Knox, United States Commissioner.

Mim.#9.

[fol. 77] Search Warrant

UNITED STATES OF AMERICA,
Western District of Pennsylvania, ss:

To H. G. Jarrett, Federal Prohibition Agent, and his deputies or any or either of them, Greetings:

Whereas, complaint on oath and in writing, supported by affidavits, has this day been made before me, Roger Knox, United States Commissioner for the Western District of Pennsylvania, by H. G. Jarret and O. Gettel, alleging that they have reason to believe and do believe that in and upon certain premises within the Western District of Pennsylvania, to wit, the premises of Three story brick building, used as warehouse, 1026 Watson St., Pittsburgh, Pa., there have been and are now located and concealed intoxicating liquors (or property designed for the manufacture of intoxicating liquors) which said liquors (or property) are being sold and possessed for beverage purpose in violation of the National Prohibition Act, approved October 28, 1919, and of the Statutes of the United States; and

Whereas, the particular grounds for probable cause for the issuance of this Search Warrant consist of the testi-

mony of H. G. Jarrett & O. Gettel, Prohibition Agents, who personally appeared before me the undersigned United States Commissioner, and testified, and their further affidavits charging that on May 10th, 1928, at about 9:30 A. M. they detected a strong odor of moonshine whiskey emanating from the above described premises, this odor being [fol. 78] detected at a distance of about seventy-five feet. That on May 9th, 1928, at about 9:00 P. M. Agt. Jarrett made an investigation and detected a very strong odor of moonshine whiskey emanating from the above premises; that Agent Jarrett has had these premises under observation for a period of ten days; during this time he saw cars with West Va. and Ohio license plates going to and from this place; that he saw about 100-5 gal. cans in this building, the door being open, (such 5-gal. cans as used for conveying moonshine whiskey by bootleggers).

Whereas, this cause coming on for hearing on the application for a search warrant supported by affidavit as herein stated, and the undersigned United States Commissioner is satisfied of the existence of the ground of the said application and that there is probable cause to believe their existence:

Now therefore, pursuant to Title XI of the Act of Congress approved June 15, 1917, and pursuant to the provisions of the National Prohibition Act, you are hereby authorized and commanded, in the name of the President of the United States to enter said premises during the day time with the necessary and proper assistance and forthwith search the same for all such liquor and property hereinbefore specified, to seize and take the same into your possession, if found; to bring the said liquor and property before the undersigned, and to report and act concerning the same as required of you by law.

[fol. 79] Witness the hand and seal of the United States Commissioner, at Pittsburgh, in said District, this 10th day of May 1928.

Roger Knox, United States Commissioner. (Seal.)

Return on Search Warrant

Returned this — day of ——, A. D. 192–.

Warrant served May 10th, 1928, at 2:45 P. M. by making search as within directed with the assistance of the follow-

ing persons: Agts. Gettel, Pindro, Isler, Weinheimer, Scales, Brought, Sigworth, Jarrett, DeHaas.

Upon said search I found and duly inventoried the seized property as follows:

1 5 gal. jug whiskey chips taken from barrel.

1 5 gal. jug whiskey chips found in portable case part full.

1 1 gal. jug whiskey found under sink, part full.

1 Box Assorted Strip Stamps.

1 Buick Touring Car.

1 Durant Coupe.

For detailed list of property see attached 2 sheets.

I, H. G. Jarrett, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

[fol. 80] I further certify and swear that a copy of this warrant, together with a detailed receipt for the said liquor or property taken, was*

*given to left on premises, the person from whom it was taken.

*given to —— ——, the person in whose possession it was found.

*left in the place where the said property was found, no person being present.

H. G. Jarrett, Prohibition Agent.

Subscribed and sworn to before me this 11th day of May, 1928. Roger Knox, United States Commissioner.

*Strike out lines not needed.

Mim.8—back.

Sheet 1

135 Empty 5 gal. cans.
1 Victor Adding Machine.
1 Check Protector (Hevman).
1 Typewriter.
1 Parcel Post Scale.
422 Cases Empty Bottles.
49 Packages Empty Bottles.
369 Empty Whiskey Barrels.

[fol. 81] 6 1 gal. Empty Jugs.
1 10 gal. Empty Can.
2 5 gal. Crocks.
1 25 gal. Empty Can.
4 Boxes Gin Bottle Caps.
1,837 Cartons Empty Pint Bottles.
203 Bundles Cardboard Cartons.
80 5 gal. demijohns empty.
75 " " "
1 box Bottle Caps.
124 Bundles of Small Flat Pieces Cardboard.
5 Bundles Paper.
5 Cartons ½ Pint Bottles.
1 " Quart Bottles.
11 " Gin Bottles.
3 Cans Glyco.
Lease 2 oz. bottles.
42 Cases Quart Bottles.
18 " Bottles in paper cases.
192 Packages Flat Empty Cardboard Cartons.
10 Trunks Empty Bottles.
5 Barrels part full of bottles.
4 Cases part full of Bottles.
65 " " " " "
110 Bundles Paper Cartons.
62 " Cardboard Fillers.
258 Bags Corks.
13 Boxes Corks.
1 Box Sealing Wire.
3 Boxes Wrappers for Whiskey Bottles.
2 Bags Cartons for Bottles.
5 Cartons for Whiskey Bottles.
[fol. 82] 1. Box Twine.
16 Boxes Paper Wrappers for Whiskey Bottles.
13 Boxes Caps for Bottles.
1 Box Cardboard Bottle Separators.
7 Bundles Paper Bags.
10 Crimping Machines.
3 Labelling Machines.
7 Siphons and Filters.
1 Box Assorted Whiskey Labels.
1 Box Flavoring Nuts.

2 Cases Clycerine.
1 " Gin Extract.
4 Gallons Syrup.
1 Paper Roll Folder.
2 Cans Viscose Caps.
1 Large Wood Case Corks.
2 5 Gal. Cans Glycerine.
1 Roll Paper.
1 Box Wrappers for Bottles.
3 Bundles Tissue Wrappers.
5 Bundles Bottle Cartons.
4 Bundles Heavy Wrapping Paper.
8 Boxes Bottle Cartons.
1 Bundle Paper Bags.

Sheet 2

10 Bundles Paper Wrappers.
10 Boxes Bottle Cartons.
All seizures moved to Allen Warehouse.
[fol. 83] 1 5 gal. jug wh.
1 5 gal. jug wh. & chips.
1 1 gal. jug part full wh.
1 Box Ass. Strip Stamps.
1 Buick Tr. Car.
1 Durant Coupe.
(Papers.)
Contents of safe in relation to conduct of business taken to House Bldg.
May 11, 1928, 1026 Watson St., Pgh.

H. G. Jarett.

IN UNITED STATES DISTRICT COURT

DECREE

And now on this 25th day of October, A. D. 1928 at 10:00 o'clock in the forenoon, it appearing to the Court, upon hearing and argument, that the allegations contained in the libel in the above entitled case have been sustained, it is hereby ordered, adjudged, and decreed that the seizures enumerated therein be forfeited to the United States Gov-

ernment and destroyed by the Federal Prohibition Administrator for the Sixth Administrative District, and that due sworn return be made to this order on or before December 22, 1928.

F. P. Schoonmaker, United States District Judge.

[fol. 84] In United States District Court

Notice of Appeal

To John D. Meyer, United States Attorney:

You are hereby notified that Manfred Feitler and Ike Danovitz, doing business as Feitler Bottle Company, claimants in the above case, appeal from the judgment of the District Court in the above entitled cause, and from the several rulings of the Court at the trial to which exception was taken during the trial.

Ward Bonsall, John S. Pyle, Attorneys for Feitler Bottle Company.

Service of the above notice accepted this 25th day of October, 1928.

Jos. A. Richardson, Asst. United States Attorney.

In United States District Court

Petition for Supersedeas

To the Honorable the Judges of said Court:

The petition of Manfred Feitler and Ike Danovitz, doing busines- as Feitler Bottle Company, claimants in the above case, respectfully represents:

[fol. 85] 1. Claimants are the owners of the property ordered by your Honorable Court to be forfeited and destroyed in the above case, and are aggrieved by the judgment of the Court ordering the forfeiture and destruction of said property.

2. Said property is now stored in the Government Warehouse under the custody of the libellant.

3. The claimants for reasons which will be set forth in the assignment of errors to be filed, have appealed from said judgment, and aver that the forfeiture and destruction of claimants' property will cause them irreparable damage if the Circuit Court of Appeals should reverse said judgment upon consideration of said appeal.

4. The above case involves the application of the Fourth and Fifth Amendments to the Constitution of the United States, and of the statutes and law relating to Search and Seizure, including section 25 of Title II of the National Prohibition Act to the facts and proof in this case. Claimants are advised by counsel that the appeal in this case raises substantial questions of law for the consideration of the Circuit Court of Appeals.

Wherefore your petitioners pray your Honorable Court to order that the appeal shall operate as a supersedeas, and to fix the amount of the supersedeas bond in such sum as to your Honorable Court may appear meet and proper. [fol. 86] And they will ever pray, etc.

Feitler Bottle Company, by Manfred Feitler, Claimants. John S. Pyle, Ward Bonsall, Attorneys for Claimants.

Duly sworn to by Manfred Feitler. Jurat omitted in printing.

[fol. 87] In United States District Court

Order of Supersedeas

Now, the 25th day of October, 1928, it appearing to the Court that appeal from the judgment of this Court has been taken in the above case, on motion of John S. Pyle and Ward Bonsall, attorneys for appellants, it is hereby ordered that pending the determination of the appeal the judgment appealed from be superseded, that libellant be ordered and directed not to cause the destruction of the articles mentioned in said order but that the same be safely stored to await the outcome of the appeal; and that appeal and supersedeas bond in the sum of $3,000.00 be furnished within ten days.

Per Curiam, S.

In United States District Court

Assignments of Error

Comes now, the claimants Manfred Feitler and Ike Danovitz, doing business as Feitler Bottle Company, by John S. Pyle and Ward Bonsall, their attorneys, and in connection with their appeal from the judgment of this Honorable Court rendered in the above case on October 25, 1928, assign error in the decision and judgment of the Court as follows:

1. The Court erred in holding that empty barrels, empty bottles, paper cartons, and the miscellaneous items on the list of articles seized, as set forth in the libel, came within the meaning or intent of the words "property designed [fol. 88] for the manufacture of liquor" as used in section 25 of Title II of the National Prohibition Act, under which the libel was brought, and in holding that such articles were within the meaning of the search warrant or might lawfully be seized and forfeited under said section of the statutes.

2. The Court erred in holding that there was evidence of "design" to use the property seized in this case for the unlawful manufacture of intoxicating liquor, or that any of said property had been, or was intended to be, so used; and the Court further erred in failing to hold that such "design" had not been shown by any evidence whatever, and in not placing the necessity and burden of proving "design" upon the libellant.

3. The Court erred in holding that the libel was sufficient to support a judgment of forfeiture, and in refusing to dismiss the libel on the ground that it failed to allege facts showing a lawful seizure under lawful search warrant or facts showing that the possession of the claimants at the time of seizure was illegal.

4. The Court erred in failing to decide that there was no evidence or facts showing that the search warrant was issued upon probable cause, especially in view of the objections to the search warrant contained in paragraph 7 of the Answer and Claim, wherein it is alleged that the

search warrant was improperly and illegally obtained and [fol. 89] issued for the reason that the material grounds upon which it was based were false and untrue, and that the said grounds did not authorize or support the issuance of the warrant, and that there was no probable cause to believe there were contraband goods in the premises.

5. The Court erred in placing the burden of proof that the search warrant was unreasonable, illegal and unconstitutional, and was issued without probable cause, upon claimants, thus placing upon them the burden of proving a negative, and thus relieving the United States of the necessity of proving that the search warrant was issued upon probable cause and that the search and seizure were reasonable, constitutional and lawful.

6. The Court erred in admitting, and in not suppressing, evidence obtained by the search and seizure, and in refusing to order the return to claimants of the articles seized, in view of the fact that the United States offered no evidence whatever showing a lawful entry, search or seizure upon probable cause, but, on the contrary, showing that the most material statement in the affidavit upon which the search warrant was based, namely, that affiants "detected a strong odor of moonshine whisky emanating from the above described premises," was false and untrue in fact, and therefore that the said affidavit set forth no facts showing probable cause for the issuance of a warrant.

7. The Court erred in admitting papers and evidence obtained from claimants' books of account, letters and [fol. 90] papers, seized under the search warrant in this case, but not particularly described therein as things to be seized, as required by the Fourth Amendment to the United States Constitution.

8. The Court erred in not protecting claimants from violation of their constitutional right under the Fourth Amendment to be secure against unreasonable searches and seizures, and their further right that no warrant should issue, but upon probable cause, supported by oath or affirmation, and particularly describing the things to be seized.

9. The Court erred in failing to rule in such a manner as to afford claimants the protection guaranteed by the Fifth

Amendment to the Constitution of the United States providing that no persons shall be compelled in any criminal case to be witness against himself, in that the Court cast upon claimants the burden of proving that their possession of the articles seized was lawful and that the search warrant was unlawful without first requiring any proof from the United States that claimants' possession was unlawful or that the seizure was lawfully made in pursuance of a lawfully issued and served search warrant.

10. The Court erred in holding that the United States was entitled to a decree of forfeiture in this case.

11. The Court erred in ordering forfeiture of the articles mentioned in the libel, and in making and entering its final [fol. 91] judgment of forfeiture of October 25, 1928.

Wherefore the claimants pray that the judgment rendered herein be reversed with directions to the District Court of the United States for the Western District of Pennsylvania to render judgment in favor of claimants, to dismiss the libel and to order the seized articles restored and returned to claimants, at the costs of libellant.

Ward Bonsall, John S. Pyle, Attorneys for Claimants.

[fol. 92] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 3996

MANFRED FEITLER and IKE DANOVITZ, doing business as Feitler Bottle Company, Appellants,

vs.

UNITED STATES OF AMERICA, Appellee

ASSIGNMENTS OF ERROR—Filed Sept. 18, 1929

Now comes Ike Danovitz, surviving partner of Feitler Bottle Company, Claimants, by John W. Dunkle, John S. Pyle and Ward Bonsall, his attorneys, and assigns error in the decision and rulings of the United States Circuit Court of Appeals for the Third Circuit, in this case, as follows:

First. The Court erred in holding that empty containers, empty bottles and barrels, cartons, corks, cases, caps, labels and similar articles, are forfeitable under section 25 of Title II of the National Prohibition Act (27 U.S.C.A. 39).

Second. The Court erred in misapplying the rule of liberal construction in section 3 of Title II of the National Prohibition Act (27 U.S.C.A.) in such a way as to authorize the Courts to extend the meaning of section 25 of Title II to cover empty containers, such as bottles and barrels, when, from the wording of section 25, it appears that the intent of Congress was not to include empty containers as forfeitable.

Third. The Court erred in finding facts which had not been found by the District Court, for which there was inadequate evidence and which prejudiced claimants by the Court holding that such facts were sufficient evidence under [fol. 93] section 25 to warrant the court in decreeing a forfeiture of empty containers, which the Court admits could not be forfeited, if "standing alone," under the provisions of section 25 of Title II of the National Prohibition Act.

Fourth. The Court erred in holding that the affidavit upon which the search warrant was based contained sufficient evidence of probable cause under the Fourth Amendment to the Constitution.

Fifth. The Court erred in failing to hold that since all material allegations in the affidavit for search warrant were consistent with innocence, the search warrant based thereon must be suppressed as being insufficient as evidence of probable cause under the Fourth Amendment.

Sixth. The Court erred in failing to hold that, since the libel failed to aver a search warrant seizure or to contain copies of the affidavit for search warrant, the warrant itself, and the return to the search warrant, but merely a "lawful" seizure and possession by the libellant, such libel was bad in law as a pleading upon which to base a forfeiture.

Ike Danovitz, Surviving Partner of Feitler Bottle Company, Claimants, by John W. Dunkle, John W. Dunkle. John S. Pyle, John S. Pyle. Ward Bonsall, Ward Bonsall.

(File endorsement omitted.)

[fol. 94] Certificate to foregoing paper omitted in printing.

[fol. 95] Minute entry of argument and submission March 8, 1929, omitted in printing.

[fol. 96] In United States Circuit Court of Appeals

[Title omitted]

Before Buffington, Woolley, and Davis, Circuit Judges

Opinion—Filed July 19, 1929

Woolley, Circuit Judge:

On a libel for the forfeiture of goods and wares which, after search, the United States had seized because designed for the manufacture of liquor intended for use in violating the National Prohibition Act, the District Court decreed that the goods so seized and enumerated in the libel be forfeited to the United States and destroyed. The respondents appealed. The many errors they assign may be grouped and reduced to three.

The first is that the libel is bad as a pleading because it does not state facts which in themselves warrant or sustain the decree asked for. 33 Corpus Juris 1139.

[fol. 97] The libel avers the previous seizure and present custody by the United States of contraband liquors and property designed for the manufacture of such liquors which the respondents unlawfully possessed, held and used at a named place in violation of Section 25, Title II of the National Prohibition Act. As this is a pleading not in a criminal action but in a civil suit, it is, we think, good under authority of United States vs. 385 Barrels of Wine, 300 Fed. 565, if any authority be needed in view of the clear averments of the unlawful possession and intended use of the property, aided by a full and carefully prepared bill of particulars made a part of the libel.

The respondents next charge error in the decree because, as they claim, it is based on a search and seizure made in

violation of the Fourth Amendment to the Constitution in that the affidavit on which the search warrant issued did not show probable cause. The protection which the Fourth Amendment affords against unreasonable searches and seizures is so differently regarded by persons who, on the one hand, in their zeal to enforce some other law are inclined to impinge upon this law, and persons who, on the other hand, resort to it as a cover in violating some other law, that this court, conscious of its duty to maintain this constitutional provision in all its integrity and sanctity and alert to stem any effort to enlarge or restrict it by misuse in one way or another, always pauses whenever action under the provision is challenged and, even when on its face it seems trivial, gives it full and very careful consideration. Byars vs. United States, 273 U. S. 28, 47 Sup. Ct. 248, 71 L. Ed. 520; Legman vs. United States, 295 Fed. (C. C. A. 3rd) 474, 478.

We find that the warrant conforms to the Amendment in that it is supported by oath and discloses particularly the place to be searched, which in this instance was not an occupied dwelling but a warehouse, and describes generally [fol. 98] the things to be seized, leaving open only the question of probable cause. As to this the affiants stated that they had good reason to believe, and did believe, that upon the premises named there were located and concealed intoxicating liquors and property for the manufacture of intoxicating liquors, which were being held and possessed for beverage purposes in violation of the Act; that the facts tending to establish probable cause of the affiants' belief were that when standing about seventy-five feet away they detected a strong odor of moonshine whisky emanating from the premises; that on the day before they had made a like detection; that during ten days' observation they saw motor cars with license plates of other states going to and from the place; and they saw in the building about one hundred 5-gallon cans of the kind bootleggers use for conveying moonshine whiskey.

Whether these facts so averred and sworn to constitute probable cause on which to predicate a valid search warrant cannot be tested by any fixed rule of law but can be determined by finding that they are such as to warrant a man of sense, prudence and caution in believing that

an offense against the law is being committed. Carroll vs. United States, 267 U. S. 132; Dumbra vs. United States, 268 U. S. 435. When an odor of liquor emanates from a warehouse—not a bonded warehouse and not one operating under a permit—and when it emanates on a second occasion, it is not unreasonable for one, charged with a duty, to use and in a measure rely upon his sense of smell as in other cases he may rely upon his sense of sight or taste, McBride vs. United States, 284 Fed. 416; 261 U. S. 614; Lee Qwong Mom vs. United States, 20 Fed. (2d) 470; especially in connection with the other circumstances of incoming and outgoing motor vehicles from distant states and the presence of cans of the kind known to be used in unlawful liquor traffic. We hold that the affidavit on which [fol. 99] the search warrant issued stated facts which established the constitutional essential of probable cause.

The third and most serious question raised on this appeal relates to the property seized under the search warrant and forfeited under the libel. The truth, established by the search, is that these respondents kept what might be called a bootleggers' outfitting establishment, that is, an establishment to equip bootleggers with every article they would need in plying their unlawful trade. The prohibition agents, acting under the search warant, seized about every movable thing in sight. Aside from what has been returned to the respondents and what should be returned to them, we are here concerned only with the property the government seized and specifically named in its libel as liquor and property held and possessed for unlawful use. This includes liquor found in several partly filled cans and jugs, more than a hundred empty 5-gallon cans, several thousand empty bottles of different shapes, many with labels already on them and packed in cartons ready for delivery, several thousand cardboard cartons of different kinds, several hundred demijohns, several hundred bags and boxes of corks, sealing wire, wrappers for whisky bottles, twine, caps for bottles, crimping machines, labeling machines, siphons and filters, a large number of assorted labels, cans of glyco, flavoring nuts, glycerine, gin extract, syrup, and, (aside from other articles too numer-

ous to mention) finally 402 whisky barrels all containing whisky chips and more than half containing a small quantity of whisky. Whisky chips are shavings from the interior of whisky barrels and, having absorbed whisky, are used in the manufacture of bootlegger liquor. Moreover, the barrels not having been treated to prevent the extraction of their liquor content, could be washed out with water and would on many washings through many years [fol. 100] still yield a product which, though doubtfully called whisky and having an alcoholic content well above that limited by law, is fit for beverage purposes,—so it was testified. In addition to these articles the search disclosed approximately 18,000 forged strip stamps—cap sealing stamps—in the respondents' possession bearing the names of different distillers, some American and some Canadian.

This was not a heterogeneous stock in trade open to casual purchasers desiring bottles, corks, barrels, syrup and other wares for personal or commercial purposes. The stock was so selected, kept and arranged as to make separate and distinct liquor set-ups. For instance, if a person should want to outfit an illicet gin plant he could buy from the respondents everything necessary to that business except, perhaps, the basic alcohol in large volume. He could buy gin extract and flavoring, gin bottles, labels, strip stamps, sealing wire, corks, caps and cartons. If another person, about to engage in the illicit manufacture and sale of Scotch whisky, should desire an outfit for liquor of that kind, he could get it in every detail except, perhaps, the basic alcohol in large quantities. And so a rye whisky outfit, in which would be included whisky barrels, whisky chips and whisky dregs, which, besides supplying a small quantity of alcohol, impart the flavor of rye whisky to the concoction. These outfits or set-ups were so complete that they even simulated popular pre-war brands both in shape of bottles and dress, such as "William Penn," "Golden Wedding," "Gordon Gin," "Gibson."

The respondents were without doubt bootlegger outfitters. While, admittedly, some of the articles seized and forfeited were susceptible of direct use in the physical and chemical manufacture of intoxicating liquor and might readily be determined by the court to be designed for that

use, United States vs. 18 Barrels of Alcohol, 20 Fed. (2d)
[fol. 101] 186, 187, the serious question is whether other articles capable of innocent use generally and capable of use by a bootlegger only after the liquor had been actually made, constitute "property," under Section 25, Title II of the National Prohibition Act, "designed for the manufacture of liquor intended for use in violating this title or which has been so used," for it is only property of that kind which can under the cited provision be forfeited.

Of course the respondents concede that liquor constituents as well as vats, stills and instrumentalities used or intended to be used in the actual manufacture of fluid liquor constitute property designed for such manufacture and fall within the Act, but they insistently contend that after the fluid liquor has been manufactured all other property used in connection with it, even the containers in which it is stored or carried away, do not constitute property falling within the Act.

Whether their position is right depends upon the meaning of the quoted provision, which in turn must be sought and determined by the usual canons of statutory construction. Of these the first, and in this instance the most important, is that in construing an Act of Congress the known policy of Congress in regard to the subject matter must be considered. Richardson vs. Harman, 222 U. S. 96. The subject matter is the inhibition declared in the Eighteenth Amendment to the Constitution against the "manufacture, sale, or transportation of intoxicating liquors * * * for beverage purposes." The policy of Congress in regard to this subject matter, as revealed by the National Prohibition Act, is to enforce it and make it practically effective. All the provisions of the Act are directed to stopping the use of intoxicating liquor as a beverage and to ways and means of achieving that end. Clearly, this was the purpose of Congress in enacting the national prohibition law and in embodying it in the pro-
[fol. 102] vision under review. Other canons require that the provisions should not be construed so strictly as to defeat the manifest intention of Congress, United States vs. Lacher, 134 U. S. 624, 628, 629, but that it should be construed sensibly yet always with a view to the object aimed at. Gibson vs. Jenney, 15 Mass. 205. In the search for

the legislative intention, which after all is the central and controlling consideration in every such problem, a court should look for and find, when possible, the problem which Congress had in mind, Rodenbough vs. United States, 25 Fed. (2d) (C. C. A. 3rd) 13, consider the conditions with reference to the subject matter that existed at the time of the enactment, Holy Trinity Church vs. United States, 143 U. S. 457; Northern Pacific vs. United States, 213 Fed. 162, and the causes that induced the enactment, including the policy of the government. Wisconsin Central Railroad Co. vs. United States, 164 U. S. 190, 17 Sup. Ct. 45, 41 L. Ed. 399, and sometimes look into the history of the subject. Denn vs. Reid, 10 Peters 524; Stewart vs. Kahn, 11 Wall. 493; Preston vs. Browder, 1 Wheat. 115.

Both the constitutional and legislative enactments are in their substance and history matters of such common knowledge that they do not call for recital or discussion beyond quoting another provision of the Act which aptly shows the intention of Congress with reference to the provision under review. By Section 18 of Title II the Congress declared that:

"It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor."

By these provisions (Sec. 18, 25, Title II) Congress made clear its intention to stop all unlawful manufacture of liquor by shutting off the instrumentalities by which it [fol. 103] can be made. But the purpose of Congress was not merely to prevent the unlawful manufacture of liquor and stop there, but, when unlawfully manufactured, to prevent its flow into illicit trade; and this, not only under conditions as they existed at the time of the enactment but in the future as well, according as there might develop new conditions or artifices to be met and overcome. The rule of statutory construction in this regard is that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects and business within their general purview including those that come into existence subsequent to their passage, 25

R. C. L. 778, thus admitting adjustment of the legislative intention when broadly expressed to new conditions.

It is plain that bottles, corks, sealing wire, or great quantities of these articles, do not, standing alone, constitute property designed to be used in the manufacture of liquor. Ordinarily they are lawful articles of commerce not affected by the National Prohibition Act. But when, not standing alone, they are assembled and put on sale with clearly forbidden property they take on a new character and themselves become contraband because intimately associated with unlawful manufacture and inseparably connected with the sale of the unlawfully manufactured produce.

The provision here in question is broad enough to cover instrumentalities used or designed for use after liquor has been chemically and actually made, for Congress, like everyone else, knew perfectly well that no one would manufacture liquor without intending to make a profit on it and that no one (not operating under a permit) could make a profit on it unless he sold it unlawfully, and indeed unless he put it in shape and dressed it for sale. It is also clear that no one can handle, transport or sell liquor without instru- [fol. 104] mentalities connected therewith, such as containers, glass or wooden; corks, caps or bungs to prevent outflow; cartons to prevent breakage of glass containers; labels to denote contents truly, which we assume is never done, or falsely, as was intended in this case; strip stamps, necessarily forged, to denote origin and authority to sell. Without these indicia of intention as to the use of manufactured liquor in violating the law it would be difficult and in many instances impossible to determine when possession of property designed for the manufacture of liquor is unlawful. Mere "possession of property designed for the manufacture of liquor" is not forbidden by Section 25, Title II of the Act; the inhibition goes to property so designed when the liquor manufactured or to be manufactured by it is "intended for use in violating" the Act, sale of the liquor being the most common "use." This intention to violate the Act by the use of liquor manufactured by property designed for that purpose is an inseparable part of the forbidden thing, and if the intention is to be inferred from the shape and dress of the liquor so unlawfully made, the things that reveal the intention to sell constitute, in our judgment,

property going into its forbidden manufacture with the intention to violate the law.

We are of opinion and therefore hold that under applicable rules of construction the properties seized and ordered forfeited and destroyed came within the purview and scope of the provision under review as Congress declared in widely legislating to carry out the purpose of the Eighteenth Amendment.

The decree of the District Court is affirmed.

A true copy. Teste: —— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 105] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1929

No. 3996 (List No. 12)

MANFRED FEITLER et al., Appellants,

vs.

UNITED STATES, Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed July 19, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, July 19, 1929.

Victor B. Woolley, Circuit Judge.

[File endorsement omitted.]

[fol. 105½] Clerk's certificate to foreging transcript omitted in printing.

[fol. 106] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 4, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, with the limitation, however, that counsel shall confine themselves, in the briefs and in oral argument, to the question whether the property seized is forfeitable under Sec. 25, Title II of the National Prohibition Act.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,555. U. S. Circuit Court of Appeals, Third Circuit. Term No. 424. Ike Danovitz, surviving partner of Feitler Bottle Company, claimants, petitioner, vs. The United States of America. Petition for writ of certiorari and exhibit thereto. Filed September 26, 1929. File No. 34,555.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

FILED
SEP 26 1929
CHARLES ELMORE CROPL
CLER

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 424

IKE DANOVITZ, Surviving Partner of Feitler Bottle Company, Claimants, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

JOHN W. DUNKLE,
JOHN S. PYLE,
WARD BONSALL,
Attorneys for Petitioner.

(34,555)

SUBJECT INDEX.

Petition for writ of certiorari:	Page
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writ	5
Prayer for writ	7
Affidavit of petitioner	7

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR CERTIORARI FOR REVIEW OF DECISION OF CIRCUIT COURT OF APPEALS FOR THIRD CIRCUIT, AT NO. 3996.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Ike Danovitz, surviving partner of the firm composed of Manfred Feitler and Ike Danovitz, doing business as Feitler Bottle Company, claimants, by John W. Dunkle, John S. Pyle, and Ward Bonsall, his attorneys, respectfully represents:

1. Manfred Feitler, one of the partners of the Feitler Bottle Company, died on the 12th day of January,

1929, while the appeal was pending in the Circuit Court of Appeals in the above case.

2. At the time of the search and seizure in this case claimants were conducting a merchandising business in empty bottles, corks, cartons, empty used whisky barrels, bottle labels for various manufacturers, empty cans, and similar articles.

3. Upon an affidavit by prohibition agents (Record, p. 75) that they detected an odor of "moonshine whisky" emanating from the premises (said odor being in fact that of lawful whisky from some 400 used empty whisky barrels stored in the premises for sale in regular course of business), a search warrant was issued by the Commissioner, and prohibition agents proceeded to search claimants' premises, seizing every article therein, some 57 truck loads of empty bottles, empty barrels, cartons, corks, wrapping paper, labels, strip seals, books of account, etc., but finding no liquor except such small quantities as they drained from a large number of used whisky barrels.

4. The search warrant authorized search and seizure of "liquor, and property designed for the illegal manufacture of liquor," in the wording of section 25 of Title II of the National Prohibition Act, and it has been claimed throughout this case that no such property was found, since *empty* containers are not included in the meaning of the phrases used by Congress in section 25.

5. It has also been claimed throughout this case that the affidavit on which the search warrant was

issued was not sufficient to constitute probable cause, and therefore was not in compliance with the Fourth Amendment.

6. The District Court ignored or overruled these contentions of claimants, as well as the further contention that, since section 25 authorizes a forfeiture *only* in case of legal seizure upon lawful warrant, the libel, being the basic pleading in the case, must set forth facts showing both a lawful warrant and a lawful seizure, whereas this libel did not even mention the search warrant, much less contain a copy of it and of the affidavit which was supposed to show probable cause necessary to its lawful issuance.

7. On appeal to the Court of Appeals for the Third Circuit, that court saw fit to sustain the lower court, giving reasons which are claimed to be unsound as to each of the three main points of the case.

8. As to empty containers being included in the phrase "property designed for the manufacture of liquor," the Circuit Court of Appeals' decision amounts to judicial legislation, extending the meaning of section 25 of Title II of the National Prohibition Act to articles not included in it in the form passed by Congress. Property that may be used in the manufacture of liquor is of two kinds, namely, (1) materials out of which liquor may be manufactured, and which disappear or are used up in the process, and (2) utensils used in the process of manufacture, such as stills, fermenting tubs, tanks, and like articles. Bottles and barrels are not used in the process. After manufacture

is complete, bottles and barrels may be used as containers, and when so used are expressly made seizable and forfeitable by the provisions of section 25. But as long as they are *empty* they can be neither lawfully seized nor lawfully forfeited, even when possessed by the manufacturer of liquor, much less when merely held as lawful stock in trade of a dealer in empty bottles and barrels. The argument of the Court of Appeals to the contrary is involved, uncertain, lacking in clearness, and is fallacious and erroneous.

9. As to probable cause for a search warrant, the decision of the Court of Appeals, if sound, means that a dealer in empty barrels which have been used for the lawful storage of whisky in government warehouse has no protection whatever from the Fourth Amendment. Although such dealing is entirely lawful, used whisky barrels being a recognized article of commerce, legally sold to anybody by the warehouse proprietor, they always give off an odor of whisky. While the affidavit called it "moonshine" whisky, there were no facts given to show it was moonshine, which is merely illegal whisky having, often, the same odor as legal whisky, and at the trial government witnesses admitted that the odor was that of legal whisky. Yet the Court of Appeals held that such odor, together with the statement that automobiles with Ohio and West Virginia license plates were seen to stop before the premises, and a stack of five-gallon cans, such as used by bootleggers, justified the search warrant, all in spite of the fact that every statement made, and all of them put

together, is consistent with innocence. It is submitted that probable cause can only be inferred when one or more facts are stated which are inconsistent with innocence.

10. As to the insufficiency of the libel as a pleading, claimants were prejudiced in making their defense, since the burden of proving the illegality of the warrant and of the seizure was thrown upon them by the improper libel, when the law places upon the libellant the burden of proving the legality of the search and of the seizure, and the illegality of the claimants' possession, which are the questions at issue in a forfeiture proceeding. It is high time that government officials are restrained, by authoritative decision, in their loose use of the libel in forfeiture proceedings.

11. It is respectfully submitted that there are special and important reasons why your Honorable Court should review the decision of the Circuit Court of Appeals for the Third Circuit in this case, the nature and character of some of which reasons are as follows:

(*a*) This case constitutes an attempt by prohibition officials to obtain a court decision and precedent which would authorize a similar attack upon practically all persons engaged in the business of dealing in empty bottles or barrels in the United States. It is believed that sooner or later a certiorari will be granted in a case involving the proper construction of section 25 of Title II of the National Prohibition Act in respect to the substantial questions raised in this case; and present claimants, in this case, ought to be given such

relief as to your Honorable Court, after full consideration and hearing, may appear appropriate.

(*b*) There are dealers in bottles and bottling supplies in every community whose rights and status under the prohibition laws ought to be authoritatively defined, now that government officials have begun, by the seizure in this case, an attack upon empty bottle dealers.

(*c*) The Court of Appeals has decided this important question of the status of empty containers in a way probably in conflict with the opinion of your Honorable Court, and the question is one which ought to be, in the public interest, authoritatively decided and settled by the Supreme Court.

(*d*) The decision of the Court of Appeals in regard to empty containers appears to be an unwarranted extension of the forfeiture provisions of the National Prohibition Act, and is probably untenable as a matter of sound statutory interpretation.

(*e*) The decision of the Court of Appeals for the Third Circuit in regard to lack of probable cause for the issuance of a search warrant is a decision on a matter of constitutional law which is probably in conflict with applicable decisions of the Supreme Court and of other circuit courts of appeals.

(*f*) The decision of the Court of Appeals nullifies the protection which the Fourth Amendment is designed to afford in regard to unreasonable searches and seizures, and in its effect strikes at the substance of

the constitutional right of persons who are entitled to the protection of that Amendment.

(*g*) The decision of the Court of Appeals for the Third Circuit in regard to the insufficiency of the libel as a pleading in a forfeiture case under section 25 of Title II of the National Prohibition Act is in conflict with decisions of other circuit courts of appeals, notably with decisions of the Court of Appeals for the First Circuit.

WHEREFORE your petitioner respectfully prays your Honorable Court to grant a writ of certiorari for the review of the decision of the Circuit Court of Appeals for the Third Circuit of your Honorable Court.

And he will ever pray, etc.

IKE DANOVITZ,
SURVIVING PARTNER OF FEITLER
BOTTLE COMPANY,
Claimants,

By JOHN W. DUNKLE,
76 *St. Nicholas Building, Pittsburgh, Pa.,*
JOHN S. PYLE,
328 *Bakewell Building, Pittsburgh, Pa.,*
WARD BONSALL,
71 *St. Nicholas Building, Pittsburgh, Pa.,*
Attorneys for Petitioner.

COMMONWEALTH OF PENNSYLVANIA,
County of Allegheny, ss:

Before me, the undersigned authority, personally appeared Ike Danovitz, surviving partner of Feitler

Bottle Company and the petitioner above named, who, being duly sworn according to law, deposes and says that the facts set forth in the above petition are true, as he verily believes.

IKE DANOVITZ.

Sworn and subscribed before me this 21st day of September, 1929.

[SEAL.] LOTTIE R. KEYS,
Notary Public.

Lottie R. Keys, Notary Public.
My commission expires February 19, 1933.

FILE COPY

Office Supreme Court, U.
FILED
SEP 26 1929
CHARLES ELMORE CROPL
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 424

IKE DANOVITZ, Surviving Partner of Feitler Bottle Company, Claimants, Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

JOHN W. DUNKLE,
JOHN S. PYLE,
WARD BONSALL,
Attorneys for Petitioner.

(34,555)

INDEX.

Subject Index.

	Page
Table of cases cited	4
Report of opinion of court of appeals	1
Jurisdiction of Supreme Court	1
Statement of the case	2
Errors urged	4
Argument	5
I. Introduction	5
II. The merchandise ordered forfeited was not usable in the "manufacture" of liquor, and therefore not within the meaning of Section 25 of Title II of the National Prohibition Act	10
III. The search and seizure were unconstitutional	18
IV. The libel was insufficient both as a pleading under the adjective law and as a legal basis for a judgment of forfeiture under the substantive law applying to the forfeiture of seizures made by Government agents	27

Table of Cases Cited.

Avignone v. United States [1926, 2d Cir.], 12 F. (2d), 509	30
Baumboy v. United States [1928, 9th Cir.], 24 F. (2d), 512	22
Betz, Claimant [1926, 3d Cir.], 9 F. (2d), 1022	28
Boyd v. United States [1884], 116 U. S., 616	21, 39
Byars v. United States [1926], 273 U. S., 28	26
Carroll v. United States [1925], 267 U. S., 132	22
Castro v. United States [1927, 1st Cir.], 23 F. (2d), 262	8, 38
Century Dictionary, "Moonshine"	19
Constitution, Fourth Amendment	18, 26, 39
Constitution, Fifth Amendment	39
Cornell v. Moore [1922], 257 U. S., 491	15
Corpus Juris, Vol. 33, p. 1139	36
Corpus Juris, Vol. 41, p. 211	19
Crowder v. Fletcher, 80 Ala., 219	32
Daeufer-Lieberman Brewing Co. v. United States [1925, 3d Cir.], 8 F. (2d), 1	27, 33, 35, 38

INDEX.

Subject Index.

	Page
Table of cases cited	i
Report of opinion of court of appeals	1
Jurisdiction of Supreme Court	1
Statement of the case	2
Errors urged	4
Argument	5
I. Introduction	5
II. The merchandise ordered forfeited was not usable in the "manufacture" of liquor, and therefore not within the meaning of Section 25 of Title II of the National Prohibition Act	10
III. The search and seizure were unconstitutional	18
IV. The libel was insufficient both as a pleading under the adjective law and as a legal basis for a judgment of forfeiture under the substantive law applying to the forfeiture of seizures made by Government agents	27

Table of Cases Cited.

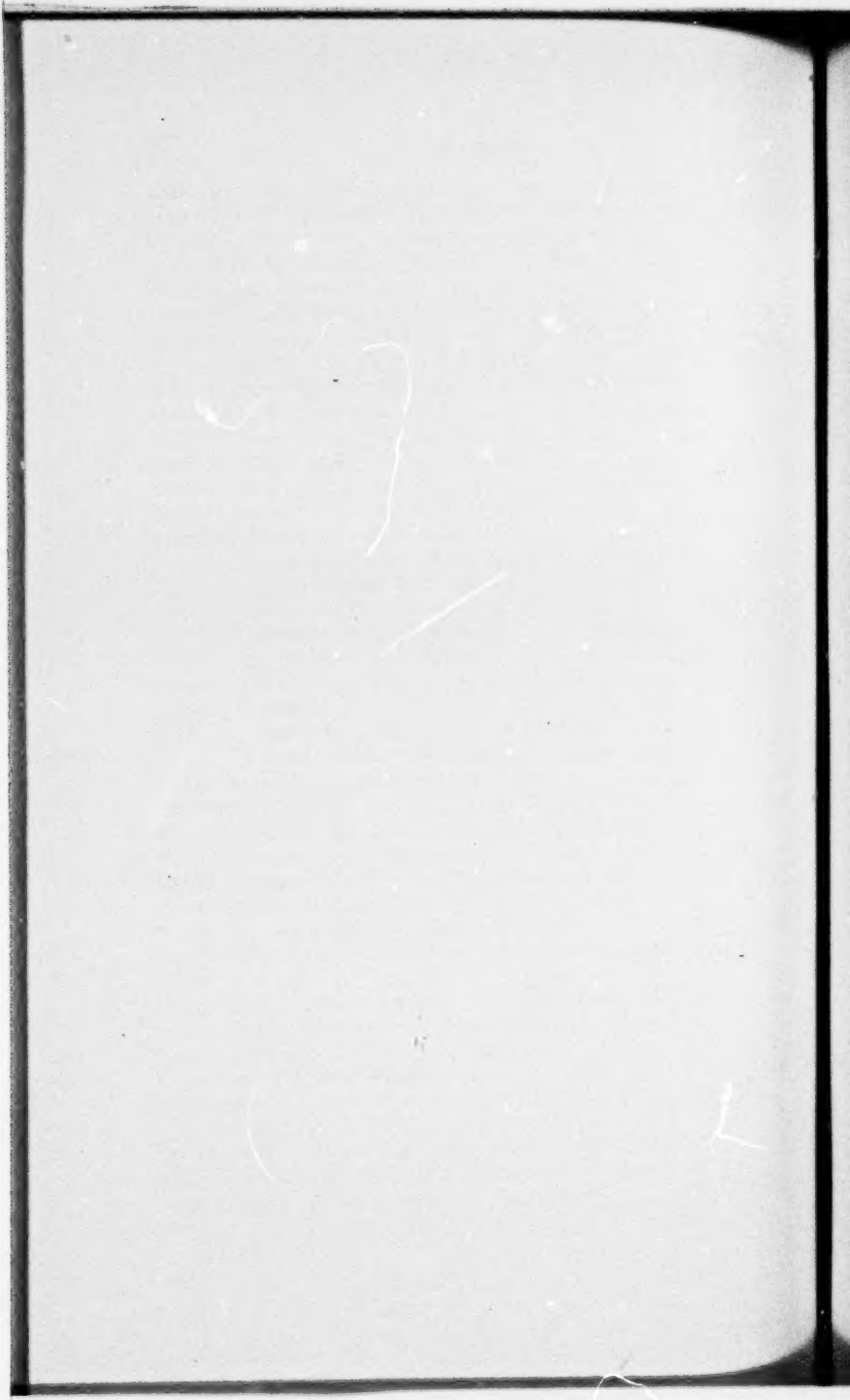
Avignone v. United States [1926, 2d Cir.], 12 F. (2d), 509	30
Baumboy v. United States [1928, 9th Cir.], 24 F. (2d), 512	22
Betz, Claimant [1926, 3d Cir.], 9 F. (2d), 1022	28
Boyd v. United States [1884], 116 U. S., 616	21, 39
Byars v. United States [1926], 273 U. S., 28	26
Carroll v. United States [1925], 267 U. S., 132	22
Castro v. United States [1927, 1st Cir.], 23 F. (2d), 262	8, 38
Century Dictionary, "Moonshine"	19
Constitution, Fourth Amendment	18, 26, 39
Constitution, Fifth Amendment	39
Cornell v. Moore [1922], 257 U. S., 491	15
Corpus Juris, Vol. 33, p. 1139	36
Corpus Juris, Vol. 41, p. 211	19
Crowder v. Fletcher, 80 Ala., 219	32
Daeufer-Lieberman Brewing Co. v. United States [1925, 3d Cir.], 8 F. (2d), 1	27, 33, 35, 38

Page

Dobbins Distillery v. United States [1877], 96 U. S., 395..... 28
Dumbra v. United States [1925], 268 U. S., 435..... 22
Gelston v. Hoyt [1818], 3 Wheat., 246..... 28
Ghisolfo v. United States [1926, 9th Cir.], 14 F. (2d), 389.... 33
In re Lobosco [1926, E. Pa.], 11 F. (2d), 892..... 21
Kohler v. United States [1929, 1st Cir.], 33 F. (2d), 225..... 10
Legman v. United States [1924, 3d Cir.], 295 Fed., 474..... 21
Proulx v. United States [1929, 1st Cir.], 32 F. (2d), 760..... 25
Siden v. United States [1925, 8th Cir.], 9 F. (2d), 241..... 23
Simmons v. United States [1927, 8th Cir.], 18 F. (2d), 84.... 25
State v. Brown [1924], 304 Mo., 78..... 20
State v. Knosky [1921], 87 W. Va., 558..... 20
State v. Smith [1924], 184 Wis., 664..... 20
State v. Tuten [1902], 131 N. C., 701..... 20
Statutes—Food and Drug Act, Sec. 10..... 34
Sec. 3 of Title II, N. P. A..... 8, 15
Sec. 18 of Title II, N. P. A..... 15
Sec. 25 of Title II, N. P. A..... 5, 14, 28, 30
Sec. 26 of Title II, N. P. A..... 30
Sec. 27 of Title II, N. P. A..... 30
Street v. Lincoln Safe Deposit Co. [1920], 254 U. S., 88..... 11
Talent v. United States [1929, 1st Cir.], 32 F. (2d), 630..... 39
Textbooks—Endlich, Interpretation of Statutes..... 32
Lewis' Sutherland, Statutory Interpretation..... 32
The Brig Ann [1815], 9 Cranch., 288..... 27
The Ray of Block Island [C. C. A.], 11 F. (2d), 522..... 38
The Underwriter, 6 F. (2d), 937..... 33
United States v. Petz [1926, 3d Cir.], 1022..... 28
United States v. Certain Malt [1927, Minn.], 23 F. (2d), 879.. 36
United States v. Cronen [1920, Pa.], 264 Fed., 459..... 15
United States v. Franzione [1923, App. D. C.], 286 Fed., 769.. 31
United States v. 419 Barrels, etc. [1926, 3d Cir.], 9 F. (2d), 1022 28
United States v. Harnich [1922, Conn.], 289 Fed., 256..... 24
United States ex rel. Frank v. Mathues [1927, E. Pa.], 17 F. (2d), 274..... 21, 35
United States v. Milano [1926, Conn.], 17 F. (2d), 334..... 23
United States v. One Lot of Intoxicating Liquor [1928, Tex.], 27 F. (2d), 903..... 30
United States v. Roma [1926, Mass.], 17 F. (2d), 270..... 25
United States v. 63,250 Gallons of Beer [1926, Mass.], 13 F. (2d), 242..... 13, 32

Page

United States v. Specified Quantities of Intoxicating Liquors [C. C. A.], 7 F. (2d), 835..... 38
United States v. 13 Cases of Ng Ka Py [1927, Cal.], 23 F. (2d), 713..... 35
United States v. 20 Barrels of Alcoholic Preparation [1928, Pa.], 30 F. (2d), 298..... 36
United States v. Veeder [1918], 242 U. S., 675..... 24
Veeder v. United States [1918, 7th Cir.], 252 Fed., 414..... 24



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 424

IKE DANOVITZ, Surviving Partner of Feitler Bottle Company, Claimants, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondents.

SUPPORTING BRIEF.

The opinion of the Circuit Court of appeals is not yet reported.

Jurisdiction.

The jurisdiction of the Supreme Court is invoked under section 240 (*a*) of the Judicial Code, being 28 U. S. C. A. 347 (*a*).

The decision of the Circuit Court of Appeals for the Third Circuit was filed July 19, 1929.

The application for certiorari is presented within three months of that date.

As the above section of the statutes applies to any case, civil or criminal, in a circuit court of appeals, no further citation of authority for the application is necessary.

Statement of the Case.

The Feitler Bottle Company, appellants, conducted a merchandising business in empty bottles, new and used, and in empty used whisky barrels, of which some 400 were seized. These barrels were bought from distillers and others offering them, and gave rise to a whisky odor. When the barrels were previously drained of the whisky which they had contained for years in bond, a small amount adhered to the surface of the inside, so that, on the day of seizure, agents were able to drain out, with or without the use of water, some eight gallons of drainings from a barrel capacity of 20,000 gallons more or less. Some of the barrels were said by the agents to contain wood shaving which the agents called "whisky chips." There was no evidence of manufacture or bottling on the claimants' premises, but only evidence of a merchandising business in barrels and bottles, cases and similar articles. No meal, sugar or other article was found of which whisky might be manufactured, but only articles that might, if the purchaser thereof desired, be used as containers for whisky or other liquid of any kind.

As to the search warrant, it was based on an affidavit of agents that "they detected a strong odor of moonshine whisky emanating from the above-described premises, this odor being detected at a distance of about 75 feet," that an agent "saw cars with West Virginia and Ohio license plates going to and from the place," and that he "saw about 100 five-gallon cans in this building, the door of which was open (such five-gallon cans as used for conveying moonshine whisky by bootleggers)." The affidavit contained no other statement that might constitute facts showing probable cause, and there was no other affidavit whatever. Yet the Commissioner issued a search warrant, and all articles seized were seized under that warrant.

The search revealed no "moonshine" whisky whatever on the premises, and that the odor emanated from whisky barrels that had long contained whisky in bond. The odor from such barrels could not be the odor of "moonshine whisky," nor is there necessarily any difference between the odor of legal whisky and the odor of moonshine whisky.

A libel for forfeiture was filed which failed to allege facts showing a legal seizure, and failed also to allege facts showing that the possession of the owners of the articles was illegal. The answer listed many other articles seized than those covered by the libel, and prayed for the return of all merchandise seized. Yet the Court based its forfeiture order upon such forfeiture libel, without amendment or modification, and in spite of claimants' timely objection thereto, without even ordering returned the merchandise not covered by the libel in this case nor any other libel.

The libel failed entirely to mention a search warrant, and of course did not contain a copy thereof, or of the affidavit on which it was based or of the return to the search warrant.

Errors Urged.

The errors urged upon the Court fall into three distinct groups, as follows:

(*a*) Those relating to the interpretation of the meaning of section 25 of Title II of the National Prohibition Act, comprising assignments First, Second and Third, and revolving around the question as to whether empty containers, not usable in the process of manufacture of liquor, are forfeitable.

(*b*) Those relating to legality of the search warrant, comprising assignments Fourth and Fifth, and revolving around the question as to whether the affidavit for search warrant (Record, p. 75) was sufficient as the basis of a legal and constitutional search warrant.

(*c*) Those relating to the libel as a sufficient pleading on which to base an order of forfeiture, being the Sixth assignment of error. This revolves around the question as to whether a lawful libel must not contain a copy of the affidavit intended to show probable cause, the search warrant as issued, and the return to the search warrant.

ARGUMENT.

I. Introduction.

The search warrant, the seizure and the libel were all brought under section 25 of Title II of the National Prohibition Act, now 27 U. S. C. A. 39, the part of which section involved in this case reads as follows:

> "It shall be unlawful to have or possess any liquor or *property designed for the manufacture of liquor intended for use in violating this title* or which has been so used, and no property rights shall exist in any such liquor or property. *A search warrant* may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917 (now 18 U. S. C. A. 611 to 631, and 633), and such liquor, the containers thereof, and *such property so seized*, shall be subject to such disposition as the Court may make thereof. If it is found that such liquor or property was *so unlawfully held or possessed*, or had been so unlawfully used, the liquor and all *property designed for the unlawful manufacture of liquor*, shall be destroyed, unless the Court shall otherwise order * * *."

The remainder of the section relates to private dwellings, and is not involved in this case.

Acting upon an affidavit of agents that they twice detected "a strong odor of moonshine whisky" emanating from the premises (Record, p. 75), that one agent "had these premises under observation for a

period of ten days," that "during this time he saw cars with West Virginia and Ohio license plates going to and from this place," and that "he saw about 100 five-gallon cans in this building, such five-gallon cans as used for conveying moonshine whisky by bootleggers," the United States Commissioner issued a search warrant under the provisions of the above section 25 (Record, p. 77), for the search of the premises for "liquor, and property designed for the manufacture of liquor sold or possessed for beverage purposes."

Without other authority than this search warrant, agents entered upon claimants' premises and searched the same, finding no still and finding no liquor except such minute quantities as they were able to drain into two or three jugs from the hundreds of used whisky barrels which formed part of the stock in trade of the Feitler Bottle Company.

Nevertheless, the agents, acting upon instructions from the Prohibition Administrator and his legal advisers, proceeded to seize and carry away the whole stock in trade of claimants, consisting of the articles listed in the return on search warrant (Record, p. 79), and many other articles not listed, but set forth in the Answer of claimants to the libel (Record, p. 9).

A libel was brought covering only part of the articles seized (Record, p. 3). A few of the articles seized have been returned, including three automobiles and a baby buggy, set forth in a list in the Answer (see Record, p. 12), but many other articles are still held by the Government (see Record, p. 10), notably

books of account and records and valuable papers. None of these could possibly be thought to come within the term "liquor and property designed for the manufacture of liquor;" yet the Government keeps them, and the Court also failed to order their return.

The libel did not set forth a copy of the search warrant papers, nor even show that the seizure was under a search warrant.

Claimants' Answer to the libel (Record, p. 9) set forth all the matters of defense which were urged upon the Court of Appeals, and are now urged upon the Supreme Court, namely:

(*a*) That the search warrant was improperly and illegally obtained and issued for the reason that the material grounds upon which it was based are and were false and untrue, and that the said grounds did not authorize or support the issuance of the said warrant; that there was no probable cause to believe there were contraband goods concealed in the premises;

(*b*) That the warrant was executed illegally and that the agents exceeded the same by seizing large quantities of property not described in the warrant;

(*c*) That the libel is insufficient in that it does not allege or aver a lawful seizure or show lawful possession or custody by libellant, nor show claimants' possession to be unlawful.

The District Court Judge who heard the case was impatient of argument on these defenses, overruled all objections of claimants, and, without opinion,

ordered the property listed in the libel forfeited and destroyed (Record, p. 83).

On appeal to the Circuit Court of Appeals, argument was heard and an opinion was filed (Record, p. 94), holding

(*a*) that the libel was sufficient in law, but ignoring the cases cited by claimants, as well as a decision in the First Circuit (*Castro v. United States* [1927, 1st Cir.], 23 F. (2d) 262), which is directly contrary to the ruling made by the Court of Appeals in this case;

(*b*) that the search warrant was legal, and that the affidavit therefor stated facts which established the constitutional essential of probable cause; the Court again ignored claimants' principal argument, to the effect that all facts stated were consistent with innocence, and also ignored the cases cited by claimants as authority for their position;

(*c*) that empty barrels and bottles, although when "standing alone" are not forfeitable, may, and in this case did, become forfeitable when held for sale by persons called by the Court "bootlegger outfitters." The Court of Appeals entirely ignored the point made by claimants that empty containers *cannot possibly* be used in the process of manufacture of liquor, and so are not within the meaning of the provisions of section 25 of Title II. The Court relies much upon the rule of liberal construction in section 3 of Title II of the National Prohibition Act, 27 U. S. C. A. 12, that "all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a bev-

erage may be prevented," using this rule as an excuse to extend the law beyond the point fixed by Congress. The Court's opinion lacks clearness, is involved, argumentative and prejudicial to the just legal rights of claimants. Besides that, the Court makes false and untrue statements about claimants' business, charging them with running "an establishment to equip bootleggers with every article they would need in plying their unlawful trade," in spite of the fact that they had no liquor, alcohol, grain, sugar, cornmeal, molasses or any other material for making liquor, except, as is argued by the Government, shavings in whisky barrels cut from the inside of the barrels and in them when claimants bought the barrels; and in spite of the further fact that they had no utensils used in manufacture, such as stills, fermenting tubs, tanks and similar articles. Claimants were merely in the empty-container business, selling bottles, caps, cartons, cases, corks, wrappers, labels, crimping machines, labelling machines, empty used barrels, empty cans, paper, paper bags, and such articles, to whoever wanted to buy the same, much of their stock being sold for other use than bootleggers' use. That bootleggers may have bought some of the articles kept by claimants for sale (which was not proved) would not make any of their stock forfeitable unless within the meaning of section 25, which the Court of Appeals held, by unsatisfactory reasoning, that it was, and which claimants continue to claim, as matter of law, that it was not.

These three distinct questions of law, in reverse order, will be considered in the remainder of this argument.

II. The Merchandise Ordered Forfeited was not Usable in the "Manufacture" of Liquor, and Therefore Not Within the Meaning of Section 25 of Title II of the National Prohibition Act.

The exact point here made relates not so much to the word "designed" as used in section 25 as to the word "manufacture" as there used. Empty containers, corks, cartons and cases are used *after* "manufacture," not during the process of manufacture.

The term "property designed for the manufacture of liquor" has a dual meaning, as follows:

(*a*) It must be *usable* in the process of making liquor.

(*b*) It must be *intended* by the owner to be so used.

This was held by the Court of Appeals for the First Circuit in the recent case of *Kohler v. United States* [1929, 1st Cir.], 33 F. (2d) 225, in these words:

> "We have no doubt that if utensils and materials *usable* in the manufacture of liquor are, by the actual owner thereof, assembled and *intended* for use or used in such illicit manufacture, section 25 makes such utensils and materials contraband; that they are 'designed' for illicit use within the meaning of section 25 and subject to forfeiture."

In that case an electric power plant used in the operation of a still had been ordered forfeited by the lower court, which order was reversed by the Court of Appeals. A power plant, like empty containers, is not usable in the process of manufacture. The Court based its opinion upon the broad ground stated by the Supreme Court in the case of *Street v. Lincoln Safe Deposit Company* [1920], 254 U. S. 88, 65 L. ed. 151, 41 Sup. Ct. 31, 10 A. L. R. 1548, as follows:

> "An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."

The same ground is applicable to empty containers, usable only as containers for the completely manufactured product.

The question is, whether Congress used the word "manufacture" in this sense, or whether that word included the bottling or barreling of the completed product.

Unfortunately the opinion of the Court of Appeals throws no light upon this exact question, but rather clouds the question in obscurity, as may be seen from a certain paragraph of the opinion in which the Court refers to "clearly forbidden property" without specifying the same and when there is no "clearly forbidden property" under seizure in this case, at least as insisted upon by claimants. This paragraph of the opinion of the Court of Appeals is here quoted as a sample

of the unsound and specious reasoning by which that Court has attempted to sustain the District Court in depriving claimants of their property:

> "It is plain that bottles, corks, sealing wire, or great quantities of these articles, do not, standing alone, constitute property designed to be used in the manufacture of liquor. Ordinarily they are lawful articles of commerce not affected by the National Prohibition Act. But when, not standing alone, they are assembled and put on sale with clearly forbidden property, they take on a new character and themselves become contraband because intimately associated with unlawful manufacture and inseparably connected with the sale of the unlawfully manufactured product."

What does the Court mean? These claimants were not bootleggers, they were dealers in empty bottles. They were not engaged in manufacture, unlawful or otherwise, nor in the sale of any unlawfully manufactured product. They were simply dealers in empty containers and in supplies that naturally go with empty containers, such as corks, seal caps, cartons and cases.

It is submitted that the Court of Appeals, in its evident desire to assist in seizing and forfeiting claimants' property, misstated both facts and law.

Counsel have found no case accurately construing the words "property designed for the unlawful manufacture of liquor," nor any case in which mere empty containers held for sale were either seized or forfeited. Such a seizure is new in prohibition practice; and this

case constitutes an attempt to extend the right of seizure and forfeiture under section 25 to merchandise never before thought to be within its meaning.

Utensils used in the manufacturing process may be seized if they are not attached to the realty. *United States v.* 63,250 *Gallons of Beer* [1926, Mass.], 13 F. (2d) 242, but in that case the question of empty bottles and barrels, namely, containers for use *after* manufacture, was not raised by the facts, because the search warrant itself, although specific in naming "kettles, vats, tanks, pipes, washer, refrigerating machine, racking and other apparatus and machinery usually found in breweries, and including dynamos, pumps, hose, pipe, engines and boilers, and a quantity of mash, malt, hops, syrup, sugar and yeast," did *not* mention any *empty container for the finished product.*

The line must be drawn somewhere; and Congress drew it at "property designed for the unlawful *manufacture* of liquor."

It is very persuasive indeed on this point, that when Congress intended to include containers as seizable it was specifically so stated in this same section 25, in which it is stated "A search warrant may issue • • • and such liquor, *the containers thereof,* and such property so seized," etc. This, of course, meant, *not* empty containers, but the containers in which the liquor was found, and Congress expressly made it lawful for agents to seize and forfeit such *used* containers having beverage liquor in them.

The fact that Congress did that shows that Congress had the status of containers in mind. The inference

is certain and clear that, since *empty* containers were *not* included in section 25 as seizable and forfeitable, it was the intention of Congress that they should *not* be seized and forfeited.

It is submitted that even a stock of empty bottles, labeled and ready for use in an illicit distillery, with a supply of corks, caps, cartons and cases, cannot lawfully be seized and forfeited under section 25. Possibly some provision of the internal-revenue laws might reach them, but that is not here the question, for the place of seizure was the warehouse of a mere dealer, and section 25 of Title II of the National Prohibition Act expresses the limit of the Government's authority. They must be brought within the provisions of that section, or they must be returned to claimants.

To all intents and purposes it is as certain that Congress did not intend to include empty containers as forfeitable under section 25 as if they had so expressly stated, because they mentioned and included containers when they were forfeitable, namely, when they contained illegal liquor.

The Court of Appeals overlooked and ignored this most direct and weighty of all considerations in arriving at the proper interpretation of the meaning of section 25. Nowhere in their opinion do they quote or consider in detail the wording of section 25. They do, however, cite the rule of construction in section 3, and rest their decision largely upon it. That rule of construction is, that "all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The Court of Appeals overlooked the fact that this rule of liberal construction is only to be used when the meaning of the law is not clear from other provisions. The Supreme Court used it in the case of *Corneli v. Moore* [1922], 257 U. S. 491, 66 L. ed. 332, 42 Sup. Ct. 176. But that rule of construction will not justify a court in extending the prohibitive provisions of the act beyond what is plainly stated, nor in omitting language which would change its plain meaning. *United States v. Cronen* [1920, Pa.], 264 Fed. 459.

It is submitted that the rule of construction in section 3 has nothing to do with the questions in the present case, and its use by the Court of Appeals was improper.

The only other provision of statute which the Court of Appeals uses in support of its reasoning is section 18 of Title II of the National Prohibition Act. It is submitted that the Court of Appeals discloses a misunderstanding of that section, since Congress, by its wording, has again negatived any intention of making empty containers illegal. In reality section 18 supports and reinforces the contention of claimants that empty containers are *not* illegal or seizable or forfeitable under the National Prohibition Act. Section 18, 27 U. S. C. A. 30, is as follows:

> "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor."

This Court will doubtless notice how carefully Congress has avoided including "empty containers" in the list, or any term that might possibly be held to include empty containers. The reason is clear. The use of containers is not part of the process of "maufacture," which is complete before containers are needed or used.

It is submitted that Congress must have intended the words "property designed for the unlawful manufacture of liquor" to mean only such articles as mash, malt, grain, meal, sugar and yeast, from which liquors are made, and such property as stills, kettles, filters, etc., being utensils used in the manufacturing process and found in the possession of the user, not empty containers, even in possession of the unlawful manufacturers. Much less would the words cover empty containers possessed by a merchant for sale in the regular course of business.

How can mere containers, even bottles with whisky labels on them, be "property designed for the illegal *manufacture* of liquor"?

Not only may such containers be used for any liquid, possibly a non-alcoholic flavoring preparation, but they would not be used at all until the "manufacture" was complete. They are not capable (in general) of being used during the process of manufacture; they can only be used after that process is finished.

In other words, it is no more illegal to sell whisky bottles to a bootlegger than it is to sell him an automobile which he will use in transporting liquor, a suit of clothes to wear while making liquor, or an account book to keep his accounts in; and such a sale

of bottles would hardly seem to be as near the line of illegality as a sale of grain, corn-meal, sugar or yeast which a grocer might suspect his customer would use "for the unlawful manufacture of liquor."

After citing section 18 of Title II and stating that Congress thereby "made clear its intention to stop all unlawful manufacture of liquor by shutting off the instrumentalities by which it can be made," the Court of Appeals must have realized that this did not warrant a decision against claimants, for it went on with a sentence that again demonstrates the lack of sound legal reasoning on which its decision is based, as follows:

> "But the purpose of Congress was not merely to prevent the unlawful manufacture of liquor and stop there, but, when unlawfully manufactured, to prevent its flow into illicit trade; and this, not only under conditions as they existed at the time of enactment but in the future as well, according as there might develop new conditions or artifices to be met and overcome."

What does this mean? What are the "new conditions or artifices" to which the Court has reference? Bottles have been used *after* manufacture ever since bottles have been made, and bottle dealers have existed since long before the Eighteenth Amendment and the National Prohibition Act became the law of the land.

This fallacious course of reasoning would open the way for a national orgy of judicial legislation, in a flood which the Supreme Court might have difficulty in stemming, unless they now stop it at its source by

granting the certiorari applied for and reversing the Court of Appeals in this case.

III. The Search and Seizure Were Unconstitutional.

If, as the Circuit Court of Appeals said in its opinion (Record, p. 94), the challenge of claimants to the sufficiency of the affidavit for search warrant (Record, p. 75) "on its face seems trivial," and that Court, in spite of its triviality, gave it, as the Court says, "full and very careful consideration," why was it that the Court, in its opinion, did not attempt in any way to meet the main contention of claimants that every fact stated in the affidavit was *consistent with the innocence* of those owning the "warehouse?"

Is this contention so "trivial" that even "very careful consideration" would not include it, or is it so unanswerable that it would be dangerous to mention it even to overrule it?

In the first place, the "warehouse" was the place of business of the Feitler Bottle Company, dealers in empty bottles and empty used whisky barrels. The agents knew that fact, but did not disclose it to the Commissioner in the affidavit. The "smell," which the Court of Appeals says is sufficient for a finding of probable cause, emanated from the 400 empty used whisky barrels, entirely legal in their possession in this particular warehouse.

Has a dealer in used barrels, which cannot be prevented from giving off a whisky odor, no protection whatever from the Fourth Amendment? If the decision of the Court of Appeals stands as the law, such

is the result. His premises are subject to search at any time, for the mere odor of whisky is enough on which to obtain a warrant. Such is the meaning of the Court's decision.

The affidavit for search warrant described the odor as that of "moonshine" whisky, but the Court of Appeals rested nothing on the word "moonshine," which, it was believed by counsel, was the only word in the affidavit that might indicate sufficiency in any way.

The reason that the Court of Appeals did not rest its decision, partly at least, on the word "moonshine" is, that the Court became convinced that the odor of "moonshine whisky" is not necessarily different from that of legal whisky, and agents admitted at the trial that the odor they detected was that of legal whisky, and no "moonshine" was found.

Moonshine whisky is simply illegally made whisky; the odor it gives off is often exactly the same as the odor given off by legally made whisky. Certain an affidavit merely charging that the empty used barrels possessed by a dealer gave off an odor of whisky would not be sufficient to show probable cause under the Fourth Amendment.

But in case it is argued that the above definition of moonshine whisky is incorrect it is proper to cite authorities on the point.

The Century Dictionary gives for "moonshine": "Smuggled spirits; so called as being brought in or taken away at night."

And for "moonshining": "Illicit distilling."

In 41 *Corpus Juris*, title "Moonshine," page 211, it is stated that "moonshine" is "liquor manufactured

illegally;" that it is "a term which refers to the unlawful manufacture of liquor."

The case of *State v. Brown* [1924], 304 Mo. 78, holds that under the Missouri statute "moonshine" has the same meaning as "corn whisky" and "hootch," namely, "*liquor manufactured illegally.*" In the case of *State v. Tuten* [1902], 131 N. C. 701, the court said:

> "It derives its name from the fact that it is carried on principally at night, or at least in secret,"

and the term "moonshine business" "refers to the unlawful manufacture and sale of spiritous liquors."

In the case of *State v. Smith* [1924], 184 Wis. 664, it was held that "moonshine" comes within the meaning of the words "privately manufactured distilled liquors."

From the case of *State v. Knosky* [1921], 87 W. Va. 558, it appears that section 3 of their statute makes illegal manufacture "other than by moonshine still" a misdemeanor, while section 37 makes moonshinging manufacture a felony. The defendant made whisky on the cook stove in his kitchen, and was charged with moonshining manufacture under section 37. The court held him not guilty, saying:

> "We know as matter of fact, and the legislature was not without the same knowledge, that what was ordinarily termed moonshine was such liquors as were manufactured in the fastnesses of the mountains and other secret and hidden places, where there was great difficulty of detecting it, and this was the popular meaning of the term."

It being thus established that "moonshine whisky" is merely illegally made whisky, and therefore that it may have the same odor as lawful whisky, we have in this case a perfect example of "unlawful and unconstitutional practices" which, as the Court said in the case of *Legman v. United States* [1924, 3rd Cir.], 295 Fed. 474,

> "get their first footing by silent approaches and slight deviations, under extenuating circumstances, from legal modes of procedure."

The Court of Appeals below cited the Legman case, but only for the proposition that whenever a search is challenged, even when on its face it seems trivial, the courts give it full and very careful consideration.

In the Legman case the Court proceeded further to say:

> "To obviate these, constitutional provisions for the security of person and property must be liberally construed. * * * It is therefore the duty of courts to be watchful for stealthy encroachments against the constitutional rights of citizens (*Boyd v. United States* [1884], 116 U. S. 616, 6 Sup. Ct. 524, 29 L. ed. 746), and this watchfulness applies to the administration of the National Prohibition Act, just as to any other law."

The District Court for the Eastern District of Pennsylvania follows this decision:

In re Labosco [1926, E. Pa.], 11 F. (2d) 892.

United States ex rel. Frank v. Mathues [1927, E. Pa.], 17 F. (2d) 274.

But in the present case the Court for the Western District of Pennsylvania and the Circuit Court of Appeals for the Third Circuit failed to follow this decision.

The Court of Appeals says that whether the facts averred in the affidavit constituted probable cause "cannot be tested by any fixed rule of law, but can be determined by finding that they are such as to warrant a man of sense, prudence and caution in believing that an offense against the law is being committed," citing *Carroll v. United States* [1925], 267 U. S. 132, 69 L. ed. 543, 45 Sup. Ct. 280, and *Dumbra v. United States* [1925], 268 U. S. 435, 69 L. ed. 1032, 45 Sup. Ct. 546.

Possibly such is the basic test applicable to this case. But if so the Court of Appeals does not explain how a "man of sense, prudence and caution," if he were also fair and unbiased, would be warranted in believing that an offense is being committed when every fact disclosed in the affidavit, and all of them put together, are consistent with innocence.

If facts alleged in the affidavit for a search warrant are consistent with innocence on the part of the person in possession of the premises, or, as stated by the court in the case of *Baumboy v. United States* [1928, 9th Cir.], 24 F. (2d) 512, are " as reasonable as a contrary assumption," then those facts are "insufficient to constitute probable cause." And in determining this question the court took into consideration the nature of the business being carried on in the premises, saying "So, also, the defendant was the known proprietor of a rooming house and was running it as such"

The situation in the present case is very similar to that disclosed in the case of *United States v. Milano* [1926, Conn.], 17 F. (2d) 334, in which the court said:

> "After all of the decisions involving search warrants that have been written, it would seem that there can be no misunderstanding as to the law upon the questions presented by this motion. The real trouble here is to apply the law to the allegations set forth in the affidavit of the officer upon the strength of which the commissioner issued the warrant * * *
>
> "Stripped of all the surplusage and immaterial allegations and conclusions of law and fact, the following is all that appears in that affidavit which is at all pertinent as the basis for the issuance of a search warrant:
>
> "'I * * * saw a commercial car drive up to said garage and saw it being unloaded * * * of several five-gallon cans. * * *
>
> "'We * * * received a very strong odor of alcohol which emanated from said garage.'
>
> "Nothing appears from which the conclusion may be drawn that the odor was alcohol fit for beverage purposes. At any rate, these facts when tested by the rules laid down in many decisions and upon the authority of *Siden v. United States* [1925, 8th Cir.], 9 F. (2d) 241, in which many of them are cited, are insufficient, and it follows, therefore, that the prayer of the petitioner must be granted, and it is so ordered."

The affidavit in the *Siden* case was much closer to showing probable cause than either the one in the Milano case or the one in the case in hand, for it included evidence of sale in the place, yet the Court of Appeals for the Eighth Circuit said:

> "But the facts disclosed by the affidavits on which this search warrant rests are altogether too scant and inconsequential to warrant the legal conclusion of probable cause or the issue of the warrant, and the result is that its issue was unwarranted and illegal."

An affidavit, in order to show probable cause, must allege facts which, if untrue, would subject the affiant to prosecution for perjury. *Veeder v. United States* [1918, 7th Cir.], 252 Fed. 414; *United States v. Harnich* [1922, Conn.], 289 Fed. 256.

In the *Veeder* case the Court said:

> "The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guesswork. If the facts afford the legal basis for the search warrant, the accused must take the consequences. But equally there must be consequences for the accuser to face. If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury. Hence the necessity of a sworn statement of facts, because one cannot be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law."

Certiorari was denied in the Veeder case. *United States v. Veeder* [1918], 242 U. S. 675, 62 L. ed. 933, 38 Sup. Ct. 428.

The statement that agents "detected a strong odor of moonshine whisky emanating from the premises" is a statement (1) that is consistent with innocence on the part of claimants, and (2) could not be the basis of a perjury charged against affiants, *because the odor*

of moonshine whisky is, or may be, exactly the same as the odor of legal whisky.

The agents may have *believed* or *suspected* that the whisky odor emanated from moonshine whisky; but that was only a belief or a suspicion, which, in this case, was incorrect, since the odor emanated from used, legal, whisky *barrels,* which were there, lawfully, in large numbers. Such an odor was not even slight evidence of illegal acts, for used, legal, whisky barrels give off the odor detected by the agents.

In the case of *Simmons v. United States* [1927, 8th Cir.], 18 F. (2d) 84, the Court cited many authorities for the following:

> "It is well established by the authorities that the affidavit for a search warrant must affirm facts, and not merely express beliefs or suspicions, and that these facts must be made by one having personal knowledge. A mere belief of the affiant is not sufficient basis for the warrant. It is not necessary that the evidence submitted be sufficient to convict, yet it must be such as would be admissible before a jury."

The facts in this affidavit for search warrant do not even indicate guilt, and would not be admissible if offered for that purpose.

The case of *Proulx v. United States* [1929, 1st Cir.], 32 F. (2d) 760, also holds that facts used to show probable cause must be such as a jury would be allowed to consider as evidence.

To the same effect as the Milano case, *supra,* is the case of *United States v. Roma* [1926, Mass.], 17 F.

(2d) 270, in which the affidavit alleged there was an odor of alcohol emanating from the premises, a garage. In holding that such affidavit did not show probable cause, the court said:

> "Nor do I think the case at bar is like those cases where probable cause was found in the ability of an agent to detect the distinctive and unmistakable odor of fermented mash. The weakness of Hall's affidavit lies in the fact that alcohol unfit for beverage purposes is frequently found in garages, and in the inability of one to determine by the sense of smell alone whether the alcohol was or was not fit for beverage purposes."

That is to say, the odor was consistent with innocence, and so does not constitute probable cause.

It appears from these cases that some courts apply other tests than that of "a man of sense, prudence and caution;" but even under that test it is respectfully submitted that no man that really possessed "sense, prudence and caution," and used those virtues, would believe from the evidence in the affidavit for search warrant in this case that claimants were committing an offense or had contraband articles on their premises.

This case furnishes a perfect example illustrating the wisdom of the Supreme Court in the case of *Byars v. United States* [1926], 273 U. S. 28, 71 L. ed. 520, 47 Sup. Ct. 248, in making the following warning statement:

> "The Fourth Amendment was adopted in view of long misuse of power in the matter of

searches and seizures both in England and the colonies; and the assurance against any revival of it, so carefully embodied in the fundamental law, is not to be impaired by judicial sanction of equivocal methods, which, regarded superficially, may seem to escape the challenge of illegality but which, in reality, strike at the substance of the constitutional right."

IV. The Libel was Insufficient Both as a Pleading under the Adjective Law and as a Legal Basis for a Judgment of Forfeiture under the Substantive Law Applying to the Forfeiture of Seizures Made by Government Agents.

The principal objection of claimants to the libel is that it does not set forth facts showing that the seizure and possession of the Government or of the libellant were lawful, and, therefore, that the Court had jurisdiction to adjudge a forfeiture.

This is *jurisdictional* in its nature. *Daeufer-Lieberman Brewing Company, Inc. v. United States* [1925, 3rd Cir.], 8 F. (2d) 1.

The Court in this cited case rested its decision on this matter of the jurisdictional nature of lawful seizure on several early cases in the Supreme Court, the binding authority of which cannot be doubted:

The Brig Ann [1815], 9 Cranch, 288, 3 L. ed. 734, in which the Court said:

> "Before judicial cognizance can attach upon a forfeiture *in rem*, under the statute, there must be a seizure * * * it must be a good subsisting seizure at the time when the libel or information is filed or allowed."

Gelston v. Hoyt [1818], 3 Wheat. 246, 4 L. ed. 381, in which the Court said:

> "Where property is seized and libeled, as forfeited to the Government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not."

Dobbins Distillery v. United States [1877], 96 U. S. 395, 24 L. ed. 637.

The decision in the *Daeufer-Lieberman* case is firmly fixed as the law in the Third Circuit:

United States v. 419 *Barrels*, etc. [1926, 3rd Cir.] 9 F. (2nd) 1022.

United States v. Betz [1926, 3rd Cir.], 9 F. (2d) 1022.

Yet the Court of Appeals for the Third Circuit, in this case, entirely disregarded this firmly fixed law, but missed the point entirely, treating the objections of claimants as if they merely related to averments of the unlawful possession of claimants.

Claimants did in fact make that objection, but are inclosed not to urge it further, relying solely upon the objection that the libel does not show a lawful seizure.

What sort of seizure is a lawful seizure giving the court, under section 25 of Title II of the National Prohibition Act, the *jurisdiction to forfeit?*

Claimants insist that section 25 requires, as a matter of *jurisdiction giving the court the power to adjudge a forfeiture*, a lawful seizure under a lawful warrant lawfully obtained upon a constitutional showing of probable cause.

To be quite specific, claimants aver that a proper and legal libel should have attached to it as part thereof, (1) an exact copy of the affidavits or sworn evidence showing probable cause, (2) an exact copy of the search warrant, and (3) an exact copy of the return to the search warrant. Only in this way can the Government show to the Court the legal basis of forfeiture.

It would be no hardship on the Government to prepare its libels under section 25 in this way. They have such papers at hand in every case where there is a right of forfeiture under that section; if they do not have them, then, it is claimed, *there is no r ght of forfeiture.*

If claimants are wrong in so construing section 25, and there may be forfeiture thereunder of seizures made *without* lawful search warrant, then claimants' argument in this part of its brief fails; therefore it is necessary at this point to examine in more detail the true meaning and interpretation of the provisions of section 25.

The first sentence of section 25 merely provides that possession of "any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used" shall be unlawful, "and no property right shall exist in any such liquor or property." This sentence establishes the status of such liquor and property, but does not provide the *method* of enforcement, which is left for the second sentence.

The second sentence provides that "a search warrant may issue * * * and such liquor, the contain-

ers thereof, and such property *so seized* shall be subject to such disposition as the court may make thereof."

The third sentence merely provides for destruction, unless the Court shall otherwise order.

The whole jurisdiction of the Court contained in the second sentence, and, it is submitted, is clearly limited to *search warrant seizures.*

The limited jurisdiction of the Court under section 25 should not be confused with the Court's jurisdiction under section 26, as to liquor and vehicles, where no search warrant is necessary, and its jurisdiction as to liquors alone under section 27, which covers the case of a seizure of liquor when there is neither search warrant nor arrest, and even when there is no claimant.

But no provision of the National Prohibition Act nor of any other statute, except only section 25 of Title II, gives the Court jurisdiction to order the forfeiture of "property designed for the illegal manufacture of liquor," and section 25 is limited to *search warrant seizures.*

It is true that some courts, notably courts in the Second Circuit, seem to hold otherwise:

> *Avignone v. United States* [1926, 2nd Cir.], 12 F. (2d) 509.
>
> *United States v. One Lot of Intoxicating Liquor* [1928, Tex.], 27 F. (2d) 903.

It is suggested that the error in such cases as these arose from confusing the legality of a *search and*

seizure with the legality of a *libel under section* 25. Many searches and seizures are legal which do not afford the basis of forfeiture under section 25, as, for example, vehicles found transporting liquor, under section 26, seizures as incident to a lawful arrest, and perhaps others.

It is believed that such decisions as the above do not correctly interpret the law, and that they are contrary to the weight of authority established by a number of cases construing the law as contended for by claimants, and now about to be cited.

This situation of conflict between lower courts makes it highly desirable that this important question of jurisdiction and power of the Court be settled by authoritative decision of the Supreme Court.

The exact question came before the Court of Appeals of the District of Columbia in the case of *United States v. Franzione* [1923, App. D. C.], 286 Fed. 769, 52 App. D. C. 307. In holding that the Court's power was limited to lawful search-warrant seizures, that Court said:

> "The National Prohibition Act was phrased with manifest particularity, and with a purpose of providing in detail for all possible contingencies which might arise under it, and the procedure prescribed by it in section 25 should have been followed in the instant case; for it is a well-established rule of statutory construction that when a law is enacted in derogation of the common-law rights of citizens, as by imposing penalties upon acts which were theretofore lawful, and as part of the enactment a specific pro-

> cedure is provided for its enforcement, the prescribed procedure must in general be regarded as exclusive and in a sense jurisdictional, unless the context or legislative history of the act plainly requires a different construction. There is nothing in the present law to justify a departure from the foregoing rule in this particular. *Lewis Sutherland, Statutory Construction* (2d Ed.), sec. 720; *Endlich, Interpretation of Statutes,* sec. 470; *Crowder v. Fletcher,* 80 Ala. 219."

This decision is definite and clear that the correct interpretation of section 25 is as contended for by claimants.

In the case of *United States v.* 63,250 *Gallons,* etc., [1926, Mass.], 13 F. (2d) 242, the Court, while passing only on the motion to quash the search warrant, which was done, took occasion to indicate their opinion as to the validity of the libel as follows:

> "I think pitfalls may be avoided in the future if federal agents would be guided by the following simple rule of conduct in seizing under section 25, especially where a manufacturing plant is involved. The rule is this: A federal prohibition agent, *acting under a valid warrant,* may lawfully enter upon the premises described in the warrant, and search and seize liquors unlawfully possessed, or personal property designed for the manufacture of liquor intended for use in violating the federal Prohibition Act, or which has been so used, provided such property is duly described in the warrant, and is capable of being moved from the premises where found, and is

so moved within a reasonable time and brought constructively, at least, before the court * * *.

"If the forfeiture proceedings are predicated wholly upon section 25 of the Prohibition Act, it would seem that the right of the court to dispose of the property is confined to the property seized on search warrant. Moreover, on general principles, it may follow as a necessary consequence of the illegality of the seizure by the prohibition agents that the libel must be dismissed. See *Daeufer-Lieberman Brewing Company, Inc. v. United States, supra; The Underwriter,* 6 F. (2d) 937. But the motion to dismiss the libel was not argued, and this question is reserved for future consideration."

We now come to the most authoritative and clear decision on the exact point of law contended for by claimants. That is the case of *Ghisolfo* v. *United States* [1926, 9th Cir.], 14 F. (2d) 389, which was a libel under section 25 of Title II of merchandise seized without a search warrant. The Court said:

"Jurisdiction to condemn or make other disposition of intoxicating liquor, or property designed for its manufacture, is not inherent in the courts. It is dependent upon statute, and the statute here in question confers no general jurisdiction in that regard. It simply provides that the outlawed property may be seized under a search warrant, issued as provided in the Espionage Act, and it is only 'such property so seized' that is subject to the disposition of the court. Such is the plain language of the statute and such has been the construction placed upon it whenever called in question."

"Our attention is directed to the provision of section 25, declaring that no property rights shall exist in any liquor or property designed for the manufacture of liquor intended for use in violation of the National Prohibition Act; but this declaration of outlawry confers no jurisdiction upon the courts of the United States to entertain a proceeding of this kind. If the act had stopped there, we apprehend there would be no contention that jurisdiction existed; and if jurisdiction exists at all it must be found in that provision of the section which says: 'And such property so seized shall be subject to such disposition as the court may make thereof.' That this provision confers jurisdiction will not be denied, but that the jurisdiction thus conferred is a limited one cannot be successfully gainsaid."

"These decisions show very clearly that the power to condemn or declare a forfeiture must be found in the statute, and that such statute must be pursued with at least reasonable strictness. The numerous cases cited by the government arising under the Food and Drug Act [34 Stat. 768 (Com. St. Secs. 8717-8728)], have no application here, because section 10 of that act (section 8726) expressly provides that the adulterated or misbranded food or drug shall be liable to be proceeded against in any District Court of the United States within the district where the same is found, and seized for confiscation by a process of libel for condemnation. The Statute now before us contains no such general provision. On the contrary, it simply provides for condemnation, forfeiture, or other disposition of property seized under a search warrant, or of vehicles seized while engaged in the act

of transporting liquor in violation of law, and of the liquor so transported, and nothing more."

The Ghisolfo case is of course followed by the District Courts in the 9th Circuit:

United States v. *13 Cases of NG KA PY* [1927, Cal.], 23 F. (2d) 713.

In the Third Circuit not only has the Court of Appeals decided the case of *Daeufer-Lieberman Brewing Company, Inc. v. United States* [1925, 3rd Cir.], 8 F. (2nd) 1, upon the same theory of law (and then failed to follow it in the present case), but the District Court for the Eastern District of Pennsylvania, in the case of *United States ex rel. v. Mathues* [1927, E. Pa.], 17 F. (2d) 274, held the same view of the law. That case was *habeas corpus,* where there was an arrest after entry under an invalid search warrant, the Government claiming that the arrest was justified because the officers found the relator committing a crime in their presence. In discharging the relator Judge Thompson said:

> "It was clearly the intention of Congress, in section 25 of Title II of the National Prohibition Act to preserve the constitutional rights of the citizen under the Fourth Amendment. • • • The power of the court to make disposition of 'such property so seized' clearly means that 'seized under search warrant.' Excepting, therefore, cases where an officer is already lawfully upon the premises, and not there as a trespasser, Congress intended that access should be obtained under the authority of a search war-

rant. Entry upon premises with an invalid search warrant is of the same effect as with no search warrant."

In the case of *United States* v. 20 *Barrels of Alcoholic Preparation* [1928, Pa.], 30 F. (2nd) 298, the District Court for the Middle District of Pennsylvania was asked to forfeit under section 25 a seizure of alcoholic preparation made without search warrant. The Court refused so to do, citing the *Ng Ka Py* case, the *Ghisolfo* case and the *Franzione* case.

The District Court in Minnesota came to a like conclusion in the case of *United States* v. *Certain Malt*, etc. [1927, Minn.], 23 F. (2d) 879.

It being then the substantive law of seizures and forfeitures that the jurisdiction of the Court to decree forfeiture rests upon a search and seizure under lawful search warrant, lawfully obtained and lawfully executed, the remaining question is, What kind of pleading is required by the adjective law?

It is submitted that the libel, being the basic pleading, must allege facts that show that the Court has the jurisdiction—otherwise the court has not the basis for a judgment of forfeiture.

The General Adjective Law is clear, and, counsel presume, undisputed, namely, that the basic pleading in any case in court must aver facts which, if true, will in themselves, under the Substantive Law applying to the case, warrant the judgment asked for. In 33 *Corpus Juris*, tit. "Judgments," p. 1139, hundreds of cases are cited for the following statement of the law, which would appear to be established beyond possibility of doubt:

> "A court cannot properly put upon its record a judgment which is not a proper sequence to the pleadings. The judgment must conform to, and be supported by, the pleadings in the case. It is a general rule that a recovery must be had, if at all, upon the facts alleged in the pleadings, and facts proved but not pleaded will not support the judgment, although found by verdict or finding."

If this were not the law, what would be the use or need of pleadings? No issue of either fact or law could be reached thereby, and the work of courts would be in confusion.

A lawful search warrant must have, as its foundation, an affidavit showing probable cause; and a lawful seizure is only lawful when the serving officer makes a return to the search warrant showing entry upon the premises named, and the articles seized. Therefore the facts showing that the Court has jurisdiction to forfeit under section 25 are—

(*a*) The affidavit of facts showing probable cause under the Fourth Amendment.

(*b*) The search warrant issued thereon.

(*c*) The return to the search warrant.

The adjective law requires these papers to be set forth as part of the pleading called a libel. It is claimants' contention, which is respectfully urged upon the Supreme Court, that without a libel so framed there can be no legal judgment of forfeiture under section 25.

The forfeiture libel in this case (Record, p. 3) merely

avers "that there is in the custody of your libellant certain contraband liquors, property * * *" etc., and later states that such property was "seized and now held by your libellant," not even mentioning a search warrant, much less giving copies of the affidavit, warrant and return, as the law requires.

That such is the law has been held in the case of *Castro v. United States* [1927, 1st Cir.], 23 F. (2d) 262, the Court of Appeals for the First Circuit saying:

> "It is nowhere alleged in the libel that the seizure was lawful, nor that the possession of the liquor, at the time and place of seizure, was unlawful; nor are facts stated from which such conclusions could be drawn. It was essential that the libel, to entitle the government to a judgment of forfeiture, should state facts showing that the possession of the liquor, at the time and place of seizure, was unlawful, and that the seizure was lawfully made. See *The Ray of Block Island* [C. C. A.], 11 F. (2d) 522; *United States v. Specified Quantities of Intoxicating Liquors* [C. C. A.], 7 F. (2d) 835; *Daeufer-Lieberman Brewing Co. v. United States* [C. C. A.], 8 F. (2d), 1, 3, 4.
>
> "It surely cannot be said that the government, where it fails to allege the essential grounds upon which a libel of forfeiture may be maintained, can in such case cast the burden upon the claimant of disproving all or any of these essential facts, and, if he fails to do so, a decree of forfeiture may be had. Furthermore, if the libel had alleged facts essential to a decree of forfeiture, even then it seems to us that the burden of going forward and making out a *prima facie* case of forfeiture would rest

upon the government before the burden of the issue as to whether the liquor was 'lawfully acquired, possessed and used' in the private dwelling at the time of the seizure would be cast upon the claimant. Otherwise under the statute (section 33), and in the absence of all proof, the allegation of the libel that the liquor was unlawfully possessed by the claimant would be taken as confessed. This would be tantamount to compelling the claimant to testify against himself or be deprived of his property—a clear violation of the Fifth Amendment to the Constitution, which applies to forfeiture cases as well as to criminal ones. *Boyd v. United States,* 116 U. S. 616, 621, 622, 630, 634, 6 S. Ct. 524, 29 L. Ed. 746. In that case, at page 630 (6 S. Ct. 632), the Court said: 'Any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation' of the Fourth and Fifth Amendments. The possession of liquor in a private dwelling is not *prima facie* evidence that it is kept for an unlawful purpose. It is only when it is possessed elsewhere than in a private dwelling, and without a permit, that its possession is *prima facie* evidence that it is kept unlawfully. Section 33, title 2, first clause."

The same Court has reiterated its ruling in the recent case of *Talent v. United States* [1929, 1st Cir.], 32 F. (2d) 630.

It, therefore, appears that on this part of the case, at least, there is divergence of decision between the Courts of Appeals of the First Circuit and of the Third Circuit, and that the weight of authority and the

strength of the reasoning are in favor of the First Circuit and against the decision of the Court in the instant case.

It is an important question that should be settled by the Supreme Court of the United States in the present case.

All of which is respectfully presented.

JOHN W. DUNKLE,
JOHN S. PYLE,
WARD BONSALL,
Attorneys for Claimants.

(9562)

FILE COPY

APPELLANTS' BRIEF

FILE
APR 8
CHARLES ELMOR

Supreme Court of the United States

OCTOBER TERM, 1929

No. 424.

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

WARD BONSALL
JOHN S. PYLE
JOHN W. DUNKLE
Attorneys for Appellants.

(34,555)

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
Josiah Smith Co., Pennsylvania Representative,
105 Ross Street, Pittsburgh, Pa.

(34,555)

Supreme Court of the United States

OCTOBER TERM, 1929

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Subject Index.

	Page
Table of Cases	II
Reference to Opinion of Court Below	1
Jurisdiction of Supreme Court	1
Statement of the Case	2
Specification of Errors Intended to be Urged	3
Argument:	
I. Introduction and Summary	4
II. Empty Containers, not being Usable in Manufacture of Liquor, are not Seizable and Forfeitable	8
III. Discussion of the Status of the Various Seized Articles	16
IV. Even if Articles are Usable in Manufacture, there can be no Forfeiture unless the Possessor Intends to use Illegally, and Holding for Sale Negatives Right to Forfeit	25
V. Discussion of Opinion of Court of Appeals	32

Table of Cases.

	Page
Hammerle v. United States [1925, 6th Cir.] 6 F (2d) 144	30
Hunter v. United States [1922, 5th Cir.] 279 Fed. 567	28
Kohler Co. v. United States [1929, 1st Cir.] 33 F (2d) 225	12
Nosowitz v. United States [1922, 2nd Cir.] 282 Fed. 575	28
Revised Statutes, Section 3324	13
Section 3325	19
Section 3247	10
Section 3267	10
Rodenbough v. United States [1928, 3rd Cir.] 25 F (2d) 13	36
Rossman v. United States [1922, 6th Cir.] 280 Fed. 950	28
Street v. Lincoln Safe Deposit Company [1920] 254 U. S. 88	13
Stroh Products Co. v. Davis [1925, Mich.] 8 F (2d) 773	31
United States v. 18 Barrels of Alcohol [1927, E. Pa.] 20 F (2d) 186	35
United States v. 301 Cans of Acme Malt Extract [1928, Mass.] 28 F (2d) 213	31
United States v. 63,250 Gallons of Beer [1926, Mass.] 13 F (2d) 242	14
United States v. Horton [1922, Ala.] 282 Fed. 731	29
United States v. Katz [1926] 271 U. S. 354	9
United States v. Kohler Company [1929] 280 U. S. 76 A	13
5 USCA 281 to 281 d	11
28 USCA 241	10
26 USCA 292	10
26 USCA 337	18
26 USCA 338	19
26 USCA 420	24
27 USCA 12	22
27 USCA 30	7
27 USCA 39	4

Supreme Court of the United States

OCTOBER TERM, 1929

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

Opinion of Court Below.

The opinion of the Circuit Court of Appeals for the Third Circuit, in this case, is reported in 34 F (2d) 30.

Jurisdiction of the Supreme Court.

Writ of Certiorari was granted in this case on November 4, 1929, and is reported in 280 U. S. 28A (Prelim. Print), 50 Sup. Ct. 69, 74 L. ed. 107 Adv. Opin.

In its order this Court made the limitation "that counsel shall confine themselves, in the briefs and oral argument, to the question whether the property seized is for-

feitable under Section 25, Title II, of the National Prohibition Act (27 U. S. C. A. §39)."

Statement of the Case.

The Feitler Bottle Company, of which the appellant is surviving partner, conducted a merchandising business in empty bottles, new and used, and in empty used whiskey barrels, of which some 400 were seized, together with cartons, wrapping paper, corks, paper bags, crimping and labeling machines, and a large variety of articles incident to the merchandising of such articles, together with books of account, office supplies, typewriter, adding machine, check protector, files, ink, step ladders, screw driver and hammer, and a large variety of articles incident to carrying such a business, keeping accounts, records, etc. With the exception of the alleged whiskey, which was not proved (Record, p. 36), and was, in fact, mere barrel drainings taken from the barrels by the agents at the time of the raid (Record, pp. 18, 19), the list of articles seized is set forth in the libel (Record, p. 3) and in the answer (Record, p. 7).

The Government has practically admitted the illegality of the seizure of the articles mentioned in the answer (Record, p. 7), but those articles have not even yet been returned, except a few of them also listed in the answer (Record, p. 9).

The United States filed a libel, under Section 25 of Title II of the National Prohibition Act for the forfeiture of part of the articles seized, namely, the articles listed in the libel (Record, p. 3). The answer, in at least three places, paragraphs 1, 2 and 4 (Record, p. 6), denies that the

articles seized were contraband, or were designed for the manufacture of contraband liquor, or were subject to forfeiture. Yet the District Court, in disregard of the law (as appellant claims), ruled that the Government is entitled to a decree of forfeiture (Record, p. 50), and decreed forfeiture (Record, p. 56).

Upon appeal, the Court of Appeals for the Third Circuit affirmed the District Court in an opinion teeming with unsupported inferences of fact, misstatements of the evidence and erroneous interpretations of law. From the order thus made this appeal was taken.

Specification of Assigned Errors Intended to be Urged.

The Court having directed "that counsel shall confine themselves, in the brief and oral argument, to the question whether the property seized is forfeitable under Sec. 25, Title II of the National Prohibition Act," the assigned errors intended to be urged are limited to the first and third Assignments of Error, as follows (see Record, p. 62):

First. The Court erred in holding that empty containers, empty bottles and barrels, cartons, corks, cases, caps, labels and similar articles, are forfeitable under Section 25 of Title II of the National Prohibition Act (27 U. S. C. A. 39).

Third. The Court erred in finding facts which had not been found by the District Court, for which there was in-

adequate evidence and which prejudiced claimants by the Court holding that such facts were sufficient evidence under Section 25 to warrant the court in decreeing a forfeiture of empty containers, which the Court admits could not be forfeited, if "standing alone", under the provisions of Section 25 of Title II of the National Prohibition Act.

Argument.

I. INTRODUCTION AND SUMMARY.

The seizure in this case was made, and forfeiture is claimed, solely in reliance upon the authority granted by Section 25, Title II of the National Prohibition Act, which section, as incorporated in the Code as 27 U. S. C. A. 39, reads in full as follows:

> "It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in sections 434 to 454, and 456 of Title 17, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or

unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process."

Under a warrant authorizing search and seizure of liquor and property designed for the manufacture of liquor intended for use in violating the prohibition law, agents seized a large quantity of merchandise from the Feitler Bottle Company, a firm dealing in empty barrels, empty bottles, corks, cartons, and similar articles, namely, *containers*, as distinguished from materials out of which liquor can be made, and utensils usable in the manufacturing process.

Part II of this Argument will be devoted to the proposition that empty containers are not usable in the *manufacture* of intoxicating liquor, but can be used *only after* the manufacture is complete, so that *empty* containers are not to be considered as coming within the meaning of the words "property designed for the manufacture of liquor." If so, empty containers are neither seizable nor forfeitable. Containers which are *not empty* are expressly made seizable and forfeitable by Section 25 by the words "and such liquor, *the containers thereof*, and such property so seized shall be subject to such disposition as the court may make thereof." When Congress drew the line so clearly between what articles may be seized and forfeited, and what articles may not be seized and forfeited, and distinguished

between empty and filled containers, where is there any room for the involved arguments as to construction of this statute in which the Court of Appeals indulged?

Part III of this Argument will be directed to the question as to whether used whiskey barrels, some of them containing what the agents called "whiskey-chips," and all having an odor of whiskey still lingering therein, should or should not, in this case, be considered "empty containers," so as to come under the reasoning and argument of Part II or whether they are articles from which liquor might or could be manufactured, and so not covered by the reasoning of Part II.

In Part III will also be considered the dispute as to whether the agents found what should be considered "liquor" by the courts, or whether the liquids claimed to be illegally possessed liquor should not be entirely disregarded as being mere barrel drainings made by the agents themselves.

Part IV of the Argument will consider what is meant by the word "designed" in Section 25, showing that the phase "property *designed* for the manufacture of liquor intended for use in violating this chapter or which has been so used" means not merely property which might or could be so used, but also that was or is *intended by the owner or one in possession* to be so used *by him himself* or which has, *by such owner or possessor,* been so used.

If such is the law, then a dealer holding for sale has no illegal possession, whatever may be the intention of one who buys from him, and whatever may be the dealer's suspicions, or even knowledge, as to the use to which his buyers

would probably put the property which he sells them. Section 18 of Title II will be considered in this connection, and it will be shown that this section, while providing criminal penalties, does not provide for seizure and forfeiture.

Part V of the Argument will treat in some detail of the errors, fallacies and misstatements of the Court of Appeals.

That Court relied on Section 18, Title II of the National Prohibition Act, incorporated in the Code as 27 U. S. C. A. 30, which section is:

> "It shall be unlawful to advertise, manufacture, sell, or possess for sale any utensil, contrivance, machine, preparation, compound, tablet, substance, formula, direction, or recipe advertised, designed, or intended for use in the unlawful manufacture of intoxicating liquor."

How the Court of Appeals could strengthen its argument against claimants by referring to this section is beyond the understanding of counsel, except on the theory that the Court failed to note the obvious fact that *empty containers* are not covered by or included in any article mentioned in that section.

Many of the erroneous statements of fact and law made by the Court of Appeals about the business of claimants will be pointed out, and it will be shown that the Court of Appeals saw fit to state as *facts* allegations that there was no evidence of whatever and which were not found or even assumed by the District Court who heard the evidence and the arguments of counsel which do not show of record.

It is further shown in Part V that many of the statements of law made by the Court of Appeals are entirely unsound, one being unsound even to the point of absurdity.

II. THE SEIZED MERCHANDISE, BEING MOSTLY EMPTY CONTAINERS, WAS NOT USABLE IN THE "MANUFACTURE" OF LIQUOR, AND THEREFORE NOT SEIZABLE OR FORFEITABLE UNDER SECTION 25 OF TITLE II OF THE NATIONAL PROHIBITION ACT.

The exact point here made relates not so much to the meaning of the word "designed" as used in Section 25 of Title II as to the meaning of the word "manufacture" as there used.

Practically every article included in the libel in this case comes within the term *empty containers,* being such articles as empty barrels, empty bottles and corks, cartons, paper wrappers, paper bags, caps for bottles, labels, wrapping paper, empty jugs, empty demijohns, empty cans, cardboard, sealing wire, twine and cardboard cases, together with such utensils as are used in *bottling,* as distinguished from *producing* or *manufacturing,* such as siphons and filters, crimping machines and labeling machines.

This list is given so that it may be clear that the stock in trade consisted of *containers* and associated articles, and did not come within the meaning of "property designed for the *manufacture* of liquor" unless it be held that empty containers come within the meaning of that term. The few articles included in the libel and not in the above list (such as the alleged jugs of whiskey and a small amount of flavorings and syrup) are left for consideration to the next part of this Argument, since it is desired to confine this part

of the Argument to a consideration of the status of empty containers under Section 25.

The act or process of the *manufacture of liquor* is complete with its production and placing in the receiving tub, tank or cistern.

The placing of the liquor in barrels, bottles, casks or kegs comes later, and is *always* separated from the manufacturing process by a greater or less but necessarily appreciable, period of time.

If this distinction is sound, then Section 25 does not authorize the seizure and forfeiture of empty containers, being limited by its terms to "property designed for the *manufacture* of liquor."

When the National Prohibition Act was passed by Congress the distinction herein made was already in the laws of the United States and had been there for two generations.

As was said by this Court in the case of *United States v. Katz* [1926], 271 U. S. 354, 46 Sup. Ct. 513, 70 L. ed. 986, "Congress had before it the provisions of the Revenue Law governing distillers, rectifiers, and brewers," when the National Prohibition Act was passed.

Among those provisions is the definition of the most important (from both the taxation and prohibition point of view) manufacturer of liquor, namely of "distiller." It will be noted that this definition is carefully so worded as *not* to include the placing of liquor in containers. Reference is made to Section 3247 of the Revised Statutes:

"Sec. 3247. Every person who produces distilled spirits, or who brews or makes mash, wort, or wash, fit for distillation or for the production of spirits, or who, by any process of evaporation, separates alcoholic spirit from any fermented substance, or who, making or keeping mash, wort, or wash, has also in his possession or use a still, shall be regarded as a distiller."

That the process of manufacture of spirits should be regarded as complete under the Revenue laws *before* the spirits are placed in casks, barrels or bottles for storage or removal may be seen from the terms of Section 3267 of the Revised Statutes, as follows:

"Sec. 3267. The owner, agent, or superintendent of any distillery established as hereinbefore provided. shall erect in a room or building to be provided and used for that purpose, and for no other, and to be constructed in the manner to be prescribed by the Commissioner of Internal Revenue, two or more receiving-cisterns each to be at least of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery; * * * On the third day after the spirits are conveyed into such cistern they shall be drawn off into casks, under the supervision of such gauger, in the presence of the storekeeper, and be removed directly to the distillery warehouse * * *"

These provisions have been referred to by their Revised Statutes number in order to indicate their antiquity; but they have been carried into the Code as, respectively, 26 U. S. C. A. 241 and 292.

With such provisions as these in the laws of the United States for half a century, showing that the process of "manufacture" ended with production, and did not include placing in containers, it is not to be supposed that the word "manufacture" would have any different meaning when used in the National Prohibition Act. Nor did those familiar with the internal revenue laws who were placed in charge of enforcement of the prohibition law ever suppose that empty containers came within the provisions of Section 25.

It was left for those unfamiliar with the revenue laws, in charge of enforcement of the prohibition laws after the separation of the Bureau of Prohibition from the Bureau of Internal Revenue by the Act of March 3, 1927, 44 Stat. 1381, 5 U. S. C. A. 281 to 281 d to assume or claim that containers were usable in manufacture. This case, begun by a seizure on May 10, 1928, was the first case of the kind in the United States, so far as counsel knows, and in spite of the fact that large numbers of barrel and bottle dealers, in every city in the country, have sold their goods continuously, both before and since the Eighteenth Amendment and the National Prohibition Act went into effect, to whatever purchasers presented themselves, undoubtedly to bootleggers among others, in exactly the same manner as the Feitler Bottle Company may have done.

As used in Section 25 of Title II, the term "property designed for the manufacture of liquor intended for use in violating this chapter" has a dual meaning, as follows:

(a) The property must be *usable* in the process of making liquor.

(b) The property must be intended *by the owner* to be so used *by himself.*

This was held by the Court of Appeals for the First Circuit in the recent case of *Kohler Co. v. United States* [1929, 1st Cir.], 33 F (2d) 225, in these words:

> "We have no doubt that if utensils and materials *usable* in the manufacture of liquor are, *by the actual owner thereof,* assembled and *intended* for use or used in such illicit manufacture, Section 25 makes such utensils and materials contraband; that they are 'designed' for illicit use within the meaning of Section 25 and subject to forfeiture."

In that case the Government sought the forfeiture of an independent electric plant owned by the claimant, the Kohler Co., and leased by them to the Elk Breeding Association. The plant was set up at the Association's farm, ostensibly for lawful purpose. It was, however, connected by wire with an illicit distillery, and the electricity which was generated was actually used in the operation of the still. The District Court decreed forfeiture on the theory that the electric plant, having been actually used in the manufacture, came within the meaning of the words in Section 25 "or which has been so used." On appeal, the Court of Appeals reversed, holding that only "property designed for the manufacture of liquor" could be forfeited, that the words "or which has been so used" refer only to property which is "designed for the manufacture of liquor," and that an electric plant is not such property, but is designed for other purposes than the manufacture of liquor.

In the same way, empty containers are designed for another purpose than the manufacture of liquor, and cannot be used in the process of "manufacture" even as much as can an electric light plant.

In the *Kohler* case the Government petitioned for a writ of certiorari, but the petition was denied. *United States v. Kohler Co.* [1929], 280 U. S. 76A (prelim. Pr.), 50 Sup. Ct. 69, 74 L. ed. 107 (Adv. Opin.).

The Court of Appeals, in its opinion in the *Kohler* case, based its decision largely upon the broad ground stated by this Court in the case of *Street v. Lincoln Safe Deposit Company* [1920], 254 U. S. 88, 41 Sup. Ct. 31, 65 L. ed. 151, 10 A. L. R. 1548, as follows:

> "An intention to confiscate private property, even in intoxicating liquors, will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared."

In the *Street* case the Court was considering in part the meaning and application of Section 25, under which the seizure in that case was made.

It is submitted that the Court of Appeals in this case did exactly what this Court, in the *Street* case, said should not be done, namely, by "inference and construction" they convinced themselves that Congress had expressed an intention to confiscate empty containers, and they did this by extending and enlarging provisions of law "which have ample field for other operation in effecting a purpose clearly indicated and declared."

What is that "ample field for other operation" in the case of Section 25?

The answer is obvious, but one case might be cited. In the case of *United States v. 63,250 Gallons of Beer* [1926, Mass.], 13 F (2d) 242, the search warrant was specific in naming "kettles, vats, tanks, pipes, washer, refrigerating machine, racking and other apparatus and machinery usually found in breweries, and including dynamos, pumps, hose, pipe, engines and boilers, and a quantity of mash, malt, hops, syrup, sugar and yeast." In a case which included as forfeitable such doubtful items as dynamos, pumps, engines and boilers, it is noteworthy that *empty containers* were not included. The explanation of that omission is, that "manufacture" ends *before* barreling, bottling and casing, and that the sharp distinction of the internal revenue laws was consciously or unconsciously observed.

The act or process of "manufacture of liquor" must end somewhere, and the act or process of storing, distributing and using must begin at the point where "manufacture" ends. More than sixty years ago Congress definitely and clearly placed the line of distinction at the logical point, namely at the receiving cistern, providing for a three days' delay at the end of the manufacturing process before the distributing process was allowed to begin (with exceptions in the case of emergency upon special application). There is everything to indicate that Congress carried the same thought into Section 25 of Title II of the Prohibition Law, and there is nothing to indicate the opposite.

Another point may be here noted. While it may be true that by custom certain sizes and shapes of bottles have come to be called "whiskey bottles" (of which many different shapes have long been in use), others are called "beer bottles," others "wine bottles," yet, in the final analysis, and for bootlegging purposes, *any* bottle may be

used almost, if not quite, as conveniently as the usual ones. The Court of Appeals was mistaken in its assumption that hampering and interfering with a bottle business would hamper bootleggers in their activities.

Congress has defined what seizures will hamper the illicit liquor traffic, namely, "property designed for the manufacture of liquor intended for use in violating" the law; but after the liquor has once been manufactured, any bottle can be used as conveniently as any other bottle for purposes of distribution. Why seek by construction and specious argument to extend the meaning of the words used by Congress? So doing would not in the slightest degree assist in the enforcement of the prohibition laws. It would only authorize and enable agents and officers of government to harass and intimidate business men who may happen, knowingly or unknowingly, to have bootleggers among their customers.

Certain articles possessed and used by bootleggers and moonshiners have been made contraband, namely, "property designed for the manufacture of liquor," but as yet bootleggers have not been made outlaws. It is still lawful to sell them other articles. They may lawfully buy, and others may lawfully sell to them, even knowing them to be bootleggers, such things as clothing, food, automobiles, houses, furniture, machinery, building materials, and all articles of lawful commerce and trade, even including bottles and empty containers. A dealer even under Section 18, may sell to a bootlegger property usable in liquor manufacture if he does not do it for the *purpose* of illegal manufacture.

If Congress, in Section 25, intended to authorize the seizure and forfeiture of empty containers, as the Court of Appeals made itself believe, why did Congress not expressly so state? Congress did not merely *forget* containers; they remembered them and thought of them, and, when they desired to make containers forfeitable, they expressly included them. But the containers they made forfeitable were not empty containers, they were the containers having illicit liquor in them. Such containers are included in the second sentence of Section 25 as forfeitable, in the phrase "and such liquor, *the containers thereof*, and such property so seized shall be subject to such disposition as the court may make thereof."

All of these direct evidences as to the meaning and intention of Congress in using the careful language of Section 25 of Title II are of such a nature, and of such weight, that there is no necessity nor propriety in resorting to canons of construction, or other arguments that, in case of doubt as to the meaning of a statutory provision, are called into service to resolve the doubt. Not only is there no doubt discovered upon examination of Section 25, but it is found that the line of distinction, at least as applied to the case now in hand, is extraordinarily clear and distinct.

III. AS TO THE STATUS OF THE SEIZED BARRELS AS "EMPTY CONTAINERS," AND OF CERTAIN OTHER ARTICLES NOT COVERED BY THAT DESIGNATION.

The 402 seized whiskey barrels were mostly *used* barrels, to which an odor of whiskey still clung. Many of them may have contained a few drops of whiskey which, upon emptying at the distillery warehouse from which they came, had not drained out but had adhered to the inside of the barrel.

Agents making the seizure drained these dregs of whiskey from the barrels (Record, pp. 18, 19, 20), and this draining by Government agents was the source of *all* of the three or four jugs listed by the agents as containing whiskey, of which more later.

It was testified that some of these barrels contained what the agents called "whiskey chips" and that by using water an alcoholic substance tasting like whiskey could be made from them. There was not one word of evidence that claimants used, or intended to use, the barrels in this way, and Mr. Danovitz, the appellant, in his testimony (Record, pp. 37, 38, 39 and 40), denied ever so doing and stated he knew nothing of "whiskey chips," but was simply dealing in empty barrels and bottles *not* making, possessing or selling liquor in any form.

Under this state of facts it is submitted that the barrels should be considered simply empty containers. The District Court so considered the case, holding that mere empty containers are subject to seizure and forfeiture, first, over the objection (Record, p. 11), that the libel does not set forth facts showing possession to be unlawful or that said property is subject to forfeiture, second, in overruling claimants' motion for the return of the property made after the Government rested (Record, p. 36), third, in the order for decree (Record, p. 50), and in the final decree (Record, p. 56). The District Court rested nothing whatever upon "whisky chips", and nothing whatever upon the alleged seizure of liquor, which, in truth and in fact, was dropped by the Government at the trial when Mr. Richardson, the attorney for the Government, stated (Record, p. 36): "I cannot, therefore, offer these three samples in evidence", there having been an understanding with the Court and be-

tween the Government and the claimants that samples would be furnished claimants for analysis and that no evidence of liquor would be introduced except by identifying it with those samples. When Mr. Richardson made that statement, the Court and all parties considered that "liquor" was definitely removed from the case.

The barrel drainings which were contained in the several jugs and cans were as black as ink, being made so by particles of charcoal from the inside of the barrels from which the agents drained it. The total amount collected from many barrels, including the water put in to help collect the whisky, was only some eight gallons. Yet the barrel capacity of the 402 barrels at 50 gallons to the barrel, was more than 20,000 gallons. If a stock of barrels with such a capacity is to be endangered in the hands of a second hand barrel dealer by agents draining out of the barrels eight gallons of an inky looking liquid and calling it a seizure of contrabrand liquor in the possession of the dealer, the law is indeed unreasonable in operation.

The District Court, erroneous as was its decision as to empty containers being forfeitable, was not so unreasonable as to hold that any "liquor" was found and seized; such a finding was left for the Court of Appeals (Record, p. 65) to make, although that court's function was to pass upon questions of law, and not to find facts which had been disputed and *not* found by the District Court.

Barrels in which whisky had been stored in bond in Government warehouse are recognized as the subject of legitimate trade. Section 3324 of the Revised Statutes, 26 U. S. C. A. 337, provides for the effacing and obliterating

of marks, stamps and brands upon the emptying or drawing off of distilled spirits from any cask or package bearing such marks, and section 3325 of the Revised Statutes, 26 U. S. C. A. 338, provides a penalty for any person who "knowingly purchases or sells, *with inspection marks thereon*, any cask or package, after the same has been used for distilled spirits". The inference is certain that, with inspection marks effaced, the sale and purchase of such casks and packages is lawful. No law of the United States makes such trade unlawful, and all persons acquainted with the liquor trade know that such commerce has been carried on since time immemorial, both before and since national prohibition.

In the case of emptying in the presence of the storekeeper gauger for bottling in bond, Regulations 23 of the Bureau of Internal Revenue, in Article 14, contained the following:

> "The placing of hot water in the packages after the spirits have been emptied therefrom and allowing it to remain long enough to recover from the wood of the package a portion at least of the spirits which have been allowed as soakage, and upon which the lawful tax has not been paid, is not permitted.
>
> "The use of sufficient water at a normal temperature for the purpose of simply rinsing the spirits from the inner surface of the package and thus securing a more effectual drainage may be permitted, but under no circumstances must water remain in the package longer than may be necessary for this purpose, and, when emptied, the package must be immediately removed from the bottling warehouse.
>
> "The water thus used can only be employed to reduce the spirits taken from the same package or packages."

This appears to have remained the regulation in force as to this matter from the time of its promulgation, December 21, 1912, until the new Bureau of Prohibition issued its Regulations No. 6 on March 31, 1928, less than six weeks before the seizure in this case. These Prohibition Regulations No. 6 superseded Internal Revenue Regulations 23, and in the matter of treatment of barrels provided as follows, in Section 18 thereof:

> "The casks or barrels must be thoroughly rinsed with pure water, preferably hot water, or steamed, which water, or as much as of it as required, should be used to reduce the proof of the spirits to 100. The water not so used to reduce the proof of the spirits should be poured upon the ground or into a sewer."

This regulation was in force when the seizure in this case was made. All of the used whisky barrels seized by the agents must have been released by the Government under either Internal Revenue Regulations 23 or Prohibition Regulations 6. Those regulations admit that a small amount of whisky remains in a barrel when the same is emptied and released for sale by the Government Storekeeper-gauger in charge.

The question at once arises, whether the Government should be considered to be releasing into general commerce property usable in the manufacture of liquor and, when obtained by one having the intent so to use it, forfeitable by the same Government under Section 25 of Title II as "property designed for the manufacture of liquor intended for use in violating" the prohibition law; or whether it should not be considered that the Government is releasing into general commerce a mere empty container.

While the Bureaus of Internal Revenue and of Prohibition recognized that by steaming or soaking the barrel in hot water a small quantity of whisky could still be recovered from the wood, yet it is apparent that the Government considered those quantities so minute that they were beneath the notice of Government. The intention of the Government to release into general commerce mere empty containers is shown by the more recent amendments of section 18 of Regulations 6, the latest of which was made by Prohibition Treasury Decision 47, under date of June 6, 1929, and which adds the following provisions to section 18:

> "In order to prevent the recovery of spirits from such empty casks or barrels, they must be treated by the following process before being removed from the premises: Place 8 ounces of washing soda (sodium carbonate) and 5 gallons of boiling water in each cask or barrel and shake well, then let stand for 30 minutes with the bung out. Bung up and let stand for 24 hours."

Why did not the Government do this ten years ago instead of releasing barrels into general commerce which it would be dangerous for a barrel dealer to deal in? And when the Government itself, under regulations duly made, releases barrels as mere "empty barrels", is not this claimant justified in dealing in them as such?

It is submitted that to this point the argument has shown

(a) That the used whisky barrels, even if they still contained minute quantities of whisky, should be considered mere empty containers, and as such subject to the interpretations of Part II of this Argument.

(b) That no liquor or whisky was seized but that all proof thereof failed, the alleged jugs of whisky being drainings made by agents, and thus not "liquor * * * intended for use in violating this chapter or which has been so used", within the meaning of section 25.

As to alleged "whisky chips", claimants have no knowledge, but it is possible that some previous owner of some of the barrels had them shaved. What of it? Whisky chips are a mere flavoring. An alcoholic liquor cannot be made from them unless in very small quantities; they may be used as they are, to make non-alcoholic whisky flavoring preparations, of which there are many on the market and sold by grocers, druggists, department stores, and others, and used for all manner of cooking and baking. That such flavors, mostly made from whisky barrel shavings, may also be used to flavor alcohol and give it a whisky taste, makes them no less articles of legitimate commerce. Most of such whisky flavors offered freely in the market are made from used whisky barrel shavings.

In addition to the shavings, which are usable only as a flavoring there were also seized a box of flavoring nuts, a case of gin extract, and perhaps other non-alcoholic flavoring extracts. Does the Government really contend that such extracts are forfeitable? If so, why not raid every grocer and druggist in the United States, for they all carry such flavors from time to time? How can the Government contend that such preparations are forfeitable when possessed by a bottle and barrel dealer, who carries *nothing* usable for the manufacture of liquor, but not forfeitable when possessed by a grocer whose store is filled with cornmeal, sugar, flour, and similar articles, all not only usable but frequently used in the illegal manufacture of liquor?

The District Court, and also the Court of Appeals, rested much on the fact that labels of various well known brands of whisky were found in claimants' possession, some of them actually attached to a few cases of bottles. Three or four such cases of labeled bottles were very effectively exhibited to the District Court and bottles from them were shown to the Court of Appeals. Probably this Court will be treated to the same spectacle, and these claimants will again be held up to view as the world's greatest "bootleggers' outfitters".

This is a piece of dramatic nonsense which is calculated to mislead and deceive a judge who is not aware of the custom of the whisky trade for the last two generations, and probably longer.

Labels of legal distillers have always been printed, bought and sold, and dealt in for purposes wholly legitimate, both before and since national prohibition.

Every distiller (generally speaking) sold a large part of his production while it was in bonded warehouse, and issued warehouse receipts to the purchasers. Under section 3 of Title II (27 U. S. C. A. 12) expressly legalizing the purchase and sale of warehouse receipts, the practice has daily continued under national prohibition. The purchasers were mostly wholesale and retail liquor dealers, and they would withdraw their own liquor when they wanted it, and would then bottle it themselves. The purchase from the distiller was always understood to carry with it the right to label the bottles with the distiller's label, so that labels long ago became a wholly legitimate article of commerce. Unless specially copyrighted or covered by a patent office

design, any printer could print them. Distillers encouraged their use, for they tended to advertise the distiller.

After prohibition bottling by wholesale dealers and by wholesale druggists for the medicinal trade continued until about 1923 when retail druggists were limited by regulation to bottled in bond spirits (see Internal Revenue Treasury Decision 3418, dated December 22, 1922); but about the same time the concentration warehouse act of February 17, 1922, now 26 U. S. C. A. 420, became effective in operation and caused many kinds and makes of whisky to be stored in each concentration warehouse, and there was a demand for labels for each kind. In such manner labels continued to be a subject of recognized legitimate commerce which every general bottle dealer must and should carry.

The inferences drawn from labels by the District Court and the Court of Appeals are wholly unjustified. And exactly the same thing may be said as to strip seals, which the Government agents and attorneys call "counterfeit strip stamps", when there is no more similitude to real strip stamps than there is between stage money and real paper money. Strip seals were used on bottles long before the Government provided for their issuance as strip stamps showing bottling in bond. The Government simply adapted to its purposes a practice already existing. Dealing in such papers as labels and seals is a lawful trade because no law makes it unlawful; bootleggers may at times buy bottles, labels and seals, with corks, cartons, wrappers and twine, but the sale of any one of these articles is lawful, and the sale of all of them together, even as a "set-up", as the Court of Appeals called it, is likewise lawful. Why should not a bottle dealer supply other lawful articles of commerce for his customers if they desire them?

IV. EVEN IF SOME OF THE SEIZED ARTICLES ARE CONSIDERED USABLE FOR LIQUOR MANUFACTURE, YET SEIZURE AND FORFEITURE IS IMPROPER IN THE ABSENCE OF A PROVED INTENTION ON THE PART OF THE POSSESSOR THAT HE HIMSELF WILL SO USE THEM.

We have seen by the considerations of Part II of this Argument that the *design* of section 25 consists of two elements, (a) that the property must be *usable* in the manufacture of liquor, and (b) that there must be the *intention* to use it for *illegal* manufacture. Part II addressed itself to the *usability in manufacture* of empty containers, showing that empty containers are usable only *after* manufacture, and not *in* or *during* such process.

Part III of the Argument addressed itself to the question as to what articles there are in the libeled list that are not merely empty containers, and contained an argument that used whisky barrels, which may contain a few thimblesful of whisky and may also contain a little whisky soaked into the wood, are still to be regarded as mere empty containers.

But whether that is the case or not, it is clear that flavoring extracts, including the so-called "whisky chips" or barrel shavings, are not within the designation "empty containers" and may be usable during manufacture. This Part IV therefore is intended to cover particularly all such articles; it does, in fact, cover everything on the list (assuming that the alleged liquor is entirely eliminated as explained in Part III).

With the argument about to be given, empty containers are doubly covered, for the proposition of law of Part IV

is, that the second element of "design", namely, the intention of using the article illegally, is entirely lacking in this case.

Remembering that claimants were the Feitler Bottle Company, and that their business was mercantile, the "dealing at retail and wholesale in new and used bottles, cooperage and other lawful articles of trade", as stated in the Answer (Record, p. 6), and as expressly testified to by both partners (Record, pp. 37 and 42), their intention, as possessors of this stock in trade, was *to sell the same.* They may, or may not, have believed, or known, that some of the goods they sold might or would be used by the buyer in connection with the illicit traffic in liquors, but it is unimportant whether they know that fact or not, since *their only intention was to sell the articles.*

In this respect section 25 differs from section 18, which section, it will be noted, does not authorize seizure or forfeiture, but simply makes it "unlawful" to "possess for sale" certain articles, which do *not* include empty containers, which are "advertised, designed or intended for use in the unlawful manufacture of intoxicating liquor."

It is submitted that under a sound interpretation of the National Prohibition Act sections 18 and 25 do not overlap, but each applies to its particular field. Section 18 applies to the manufacturer, seller or possessor for sale of property usable in the manufacture of liquor and applies criminal penalties (but not forfeiture) when he has the intention that his articles shall be so used by the buyer. As contrasted with this, section 25 applies to the possessor of liquor or of usable property which *he himself* intends to use for the manufacture "of liquor intended for use in

violating this chapter". Section 25 not only applies criminal penalties, but it also applies seizure and forfeiture of "such liquor and property".

Such, on the whole, has been the construction placed by the courts upon these two sections.

Before proceeding to cite the cases relating to these points, it should be noted as follows:

(1) Under the National Prohibition Act *the only possession for sale that justifies seizure and forfeiture* is possession for sale of *liquor* (section 25).

(2) As to "property designed, etc.," the only possession that justifies seizure and forfeiture is possession of usable property *with the intention on the part of the possessor that he himself will use such property in the illegal manufacture of liquor which he himself intends to use in violation of law* (section 25).

(3) Possession *for sale* of "property designed, etc.," does not carry seizure and forfeiture as a penalty, either under section 18 or section 25, but, under section 18 and section 29, carries only a fine for first offense even when all the various elements of section 18 are fully proved.

(4) Possession *for sale* of property either *not usable* for manufacture (such as bottles) or *not specifically intended* and sold to be illegally used (which intention must be proved as an *independent fact)* carries not even a criminal penalty, much less a forfeiture penalty under section 25.

The argument of this Part IV is directed to the proposition that the case in hand falls within the last of these four

classifications; or, at the worst, this being a forfeiture case in which criminal liability is not directly involved, that it may possibly, as to a few of the articles, fall under the third classification, and cannot possibly carry forfeiture as a penalty.

With this analysis of the provisions as enacted by Congress, the citation of the cases bearing upon the questions involved may be very brief, and the cases may be cited in chronological order.

In the case of *Hunter v. United States* [1922, 5th Cir.], 279 Fed. 567, the defendant was convicted of making mash, wort or wash fit for distillation, the evidence showing that, in boiling down syrup, a tub of skimmings had fermented. On appeal, it appearing that the element of intention to manufacture liquor was lacking, the court reversed the conviction, saying there was no evidence "that the defendant made any fermented skimmings, or that the skimmings were not merely the residuum lawfully remaining from the conversion of sugar cane into syrup."

This case indicates that the 2nd classification above is a correct statement of the law.

In the case of *Rossman v. United States* [1922, 6th Cir.], 280 Fed. 950, there were two counts, the first under section 25 of illegal possession of "property designed, etc."; the second under section 18 of illegal possession for sale of a still. The evidence showed possession of a still for sale, followed by a sale thereof to prohibition agents ostensibly for the purpose of illegal manufacture. After conviction on both counts, the defendant appealed, the court holding that the evidence brought the case clearly within section

18, but that, since "there is no evidence in this record tending to show that the plaintiff in error intended to use this property for the manufacture of intoxicating liquors in violation of the National Prohibition Act", there should have been no conviction under section 25.

This case indicates that the 3rd classification above is a correct statement of the law.

In the case of *Nosowitz v. United States* [1922, 2nd Cir.], 282 Fed. 575, the charge was illegal manufacture and possession of a still for sale, under section 18. There was no proof that the defendant intended the still to be used for illegal manufacture. On appeal from conviction, the court held that this illegal intention must be "proved as an independent fact, or at least circumstances established from which it would be proper to permit a jury to find such intent * * * The fact that it was possible to use the vessel as a still or a part thereof, is not sufficient."

This decision supports the 4th classification above as a correct statement of law.

In the *Nosowitz* case, the lower court imposed a jail sentence for a first violation of section 18. The court specifically held that such a sentence was improper, since fine was the only penalty provided. In this the case supports the 3rd classification above as a correct statement of law.

The case of *United States v. Horton* [1922, Ala.], 282 Fed. 731, was a demurrer to an indictment under section 25 charging illegal possession of a still and other property "designed and intended for use in the manufacture" of liquors but without specifying that the *defendant* intended

to use the property for illegal manufacture. The court held that under section 25 the intention to use the liquor or property illegally is the intention *of the possessor*, the court saying:

> "A still may be designed by its maker for the 'manufacture of liquor'; but this design would not make its possession by a third person unlawful, unless such third person intended to use it in the manufacture of liquor in violation of the provisions of the act. We therefore see that an unlawful intent on the part of the possessor is an essential part of the offense of having either liquor or property designed for the manufacture of liquor, in one's possession."

This case indicates that the 2nd classification above is a correct statement of law.

The case of *Hammerle v. United States* [1925, 6th Cir.], 6 F. (2d) 144, was an indictment under section 18. On objection to the wording of the indictment, which was worded like the statute, the court held it sufficient, since it could and should be understood to mean an intent by the *seller* that the substance be used for an unlawful purpose. The court said, after quoting the words of the indictment:

> "Possibly this language might be satisfied by showing possession by Hammerle but unlawful intent by his vendee only; and, while *in that event the defendant could not be convicted*, the result would be because of the proof, and not because of the indictment."

As to its ruling as to the real meaning of section 18, the court was right, and the case indicates that the 4th classification above is a correct statement of the law; but,

quaere, whether the court was right as to the wording of the indictment.

The case of *Stroh Products Co. v. Davis* [1925, Mich.], 8 F. (2d) 773, was a review of a refusal of a permit, based on the ground that the plaintiff made malt which was used to make beer, but which has many other uses. It was held that this was not enough to justify refusal of permit, but it must be shown that the malt was made and sold *with the intent on the part of the seller* that it be used in illegal manufacture. This was not shown, and refusal of the permit was reversed.

This case indicates that the 4th classification above is a correct statement of law.

The case of *United States v. 301 Cans of Acme Malt Extract* [1928, Mass.], 28 F. (2d) 213, was a forfeiture libel, *under section 18*, of a stock of malt extract, sugar, yeast, and other similar articles capable of use in making liquor, but held for sale by the owner. As indicated by the 3rd classification above, seizure and forfeiture cannot be made under the National Prohibition Act of any property which is merely *held for sale*, section 18 providing for no seizure or forfeiture. The court would possibly have been more logical in so holding, but it reached the same result by holding that the intent to sell for the purpose of illegal manufacture must be the intent of the *seller*, proved as an *independent fact*, and citing the *Rossman* and *Nosowitz* cases *(ubi supra)* as authority.

The case is thus an authority as to the correctness of the 4th classification above stated.

Finally, it is proper again to cite a case cited in Part II hereof, *Kohler Co. v. United States* [1929, 1st Cir.], 33 F. (2d) 225, holding that before there can be forfeiture under section 25, even of property usable in manufacture, it must be proved that "the actual owner thereof" intended to use it in illicit manufacture. This case indicates the correctness of the 2nd classification above stated.

In conclusion, it is submitted that even if the court should be of the opinion that some of the seized property is usable in the manufacture of liquor, yet, since the property was merely *held for sale*, and since there is absolutely no evidence that the possessors thereof had the intention that they themselves would use it in illegal manufacture, there can be no forfeiture, and the seizure was unjustified under section 25 or any other provision of law.

V. AS TO STATEMENTS IN THE OPINION OF THE COURT OF APPEALS.

Having, up to this point, developed and stated what might be regarded as claimants' affirmative argument to the effect that their possession of the merchandise was an entirely lawful possession and should not have been interfered with, it is proper, in bringing the argument to a close to call attention to some of the misstatements of fact and law made by the Court of Appeals.

Confining this comment to what the Court of Appeals said about "the third and most serious question", beginning on page 65 of the Record, claimants object to the statement of the Court of Appeals that they kept what might be called a bootleggers' outfitting establishment, to equip bootleggers with every article they would need in plying

their unlawful trade. *This is simply not true.* Claimants were dealers in empty bottles and barrels, and in such associated articles as their customers wanted. Of course the Government selected from the 57 truckloads of merchandise seized only those articles that would make it appear that claimants dealt only with bootleggers. But of course such is not the case. And as to selling "every article" needed by bootleggers, it is absolutely untrue. Claimants sold no liquor whatever, nor anything out of which liquor could be made, unless the barrels could be so designated, and at that, the Government itself would seem to be at least equally guilty in releasing such barrels. As to barrels, the *fact* is, that claimants bought them one, two or three at a time, and sold them to "bigger barrel men" (Record, p. 37), or to the North Side Cooperage Company (Record, p. 40) in lots of "fifty, thirty, forty—all small quantities."

Claimants were so far from selling to bootleggers "every article" they needed that they only sold to anybody, whether bootlegger or other person, *only* empty containers and the cartons, cases, etc., to go with the empty containers. Bootleggers certainly could not do business if they confined themselves to the articles they could buy from claimants.

Why should the Court of Appeals, or any court, make such an unfair and untrue statement about a litigant before it? The District Court, although in error in the case, made no such statement as the one here objected to.

In the same paragraph (Record, p. 65) the Court of Appeals stated that liquor was found in several partly filled cans and jugs, thereby calmly ignoring the testimony that

agents put it there; and also ignoring the fact that possession of liquor by claimants was not proved, and that the District Court did not hold that liquor was possessed.

Claimants next take exception to the statement of the Court of Appeals that the barrels had not "been treated to prevent the extraction of their liquor content", when Government regulations not only did not require such treatment when these barrels were emptied in warehouse, but they actually forbade it, as shown in Part III of this Argument.

Claimants next object to the Court of Appeals stating that there were "forged strip stamps" found, when the strip seals that were found were *not* in the similitude of genuine strip stamps, the essential wording, appearance and make-up being entirely different.

In the next paragraph of the opinion (Record, p. 66) the misleading statements are in part as follows:

That this was not a heterogeneous stock in trade open to casual purchasers desiring bottles, corks, etc. The fact is, it was just that.

That the stock was so selected, kept and arranged as to make separate and distinct liquor set-ups. To only a small degree was this true, but the Government, by its selection of exhibits, very greatly magnified this feature, which, after all, is only good commercial practice.

That claimants sold "everything" necessary for an illicit gin plant, except, perhaps, the basic alcohol in large volume. Claimants sold no alcohol at all, either in large or small quantities, and they sold *nothing* that an illicit gin

plant might want except, possibly, empty bottles, corks and cases, with some non-alcoholic flavoring. Claimants sold neither utensils for manufacture nor materials for manufacture. How, then, can the Court of Appeals' statement be true?

The Court of Appeals said that "admittedly, some of the articles were susceptible of direct use in the physical and chemical manufacture of intoxicating liquor." Claimants have not admitted any such thing. If the barrels contained any liquor soaked into the wood or adhering to the inside, that liquor had already been "physically and chemically" manufactured, and that manufacture had been a legal one. The Court of Appeals then proceeds to say that these articles "might readily be determined * * * to be designed for that use". For that unsound proposition the Court of Appeals then cites a case which has nothing whatever to do with any known situation in the present case, the case of *United States v. 18 Barrels of Alcohol*, [1927, E. Pa.], 20 F. (2d) 186. The merchandise was there, 18 barrels of alcohol, and the court held that forfeiture depends on there being an intention to sell it illegally, which is a question of fact which must be proved. But an intention to sell "property designed, etc.," even if there were any such property in this case, would not warrant forfeiture. As shown in Part IV, the intention must be *to use* for illegal manufacture. The Court of Appeals has failed to grasp the relationship and meaning of sections 25 and 18.

The Court of Appeals then states that claimants "insistently contend that after the fluid liquor has been manufactured all other property used in connection with it, even the containers in which it is stored or carried away, do not

constitute property falling within the Act." How can the Court of Appeals make this absolutely untrue statement? It was repeatedly stated and pointed out to that court in argument that containers which had been used by being filled, and in which liquor was stored, were expressly made forfeitable by section 25, and that the contentions of claimants related only to unused, or empty, containers.

The Court of Appeals, without even slightly considering or analyzing section 25, proceeds with an involved, contradictory and confusing discussion of the "canons of statutory construction", citing a former decision of the same court that "statutes must be read in the light of their purpose", *Rodenbough v. United States* [1928, 3rd Cir.], 25 F. (2d) 13. The opinion then quotes section 18, which is evidently completely misunderstood by the writer of the opinion, for the following amazing statement follows:

> "By these provisions (Sec. 18, 25, Title II) Congress made clear its intention to stop all unlawful manufacture of liquor by shutting off the instrumentalities by which it can be made."

What does the Court of Appeals mean by this? Congress did nothing of the kind. Property usable in liquor manufacture is, and always must and will be, spread throughout the country on every hand. Sugar, cornmeal, barley, rye, yeast, abound on all sides, and all kinds of utensils, even including stills, are lawfully on the market. Does the Court of Appeals really believe that Congress has tried to, or could if it tried, "shut off the instrumentalities by which it can be made"? Does any sane person even advocate trying to do this?

Cannot the Court of Appeals see that the effort of Congress in section 18 was to punish the *intentional* manufacture and sale of property usable in liquor manufacture, and advertised and intended for use in an illegal manner, and was limited to that very restricted effort? And cannot the Court of Appeals also see that section 25 applies *only* to bootleggers—those who break the liquor laws by having or making liquor to be sold in violation of law?

Congress and the United States Government may be powerful, but even their great power would not be sufficient to "shut off the instrumentalities by which it can be made," and they most certainly have not attempted to do so, in spite of the calm announcement of the Court of Appeals to the contrary.

The Court of Appeals then proceeds to admit that bottles, corks, sealing wire, or great quantities of these articles, are ordinarily lawful articles of commerce not affected by the National Prohibition Act. Having admitted that much, the Court of Appeals proceeds with this gem of fallacious reasoning:

> "But when, not standing alone, they are assembled and put on sale with clearly forbidden property they take on a new character and themselves become contraband because intimately associated with unlawful manufacture and inseparably connected with the sale of the unlawfully manufactured produce."

The mere fact that (1) they were *not* "put on sale with clearly forbidden property", (2) they were *not* "intimately associated with unlawful manufacture", and (3) they were *not* "inseparably connected with the sale of the unlawfully

manufactured produce", does not appear to bother the Court of Appeals in the least.

But what must reasonable men think of a decision that, without any evidence whatever, and contrary to *all* the evidence in the case, in one sentence transforms mere dealers in empty containers into moonshiners and bootleggers, and follows this with the forfeiture of a stock of empty containers which, even in an illicit distillery, could not lawfully be seized and forfeited?

It is for the reversal of such a decision that these claimants bring their case to this Court.

The five parts of this Argument having now been completed, and the same having been limited to the question whether the property seized is forfeitable under section 25 of Title II of the National Prohibition Act, as specified by this Honorable Court in its order allowing Certiorari, the same is respectfully submitted to the Court for consideration.

WARD BONSALL,
JOHN S. PYLE,
JOHN W. DUNKLE,
Attorneys for Claimants.

FILE COPY

OCT 25
CHARLES ELMO

No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1929

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	4

CITATIONS

United States of America v. *Kohler*, No. 420, October Term, 1929	5
National Prohibition Act, c. 85, Title II, Sec. 25, 41 Stat. 305, 315 (U. S. C. Title 27, Sec. 39)	2

77494—29

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER Bottle Company, claimants, petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

No formal opinion was rendered by the District Court. A short statement of that court's reasons for holding that the Government had established a *prima facie case* will be found at pages 53–54 of the record. The opinion of the Circuit Court of Appeals (R. 94) is reported in 34 F. (2d) 30.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 19, 1929. (R. 102.) The petition

for certiorari was filed September 26, 1929. Jurisdiction to issue the writ is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The main question presented is whether bottles, corks, labels, capping machines, sealing wire, forged labels, and other articles, seized with whiskey syphons, filters, etc., in a bootleggers' outfitting establishment is forfeitable as "property designed for the manufacture of liquor intended for use in violating this title," within the meaning of Section 25, Title II, of the National Prohibition Act.

Secondary questions involved are whether the search warrant in this case issued upon probable cause, and whether the libel for forfeiture was legally insufficient for failure to allege facts showing that the property sought to be condemned was lawfully in the custody of the United States.

STATUTE INVOLVED

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Section 39) provides, so far as material here, that—

> It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law

numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. * * *

STATEMENT

This case was begun by the filing of a libel in the District Court of the United States for the Western District of Pennsylvania praying for forfeiture under Section 25, Title II, of the National Prohibition Act, of a quantity of whiskey, as well as of articles described in the libel as "property and material designed for the manufacture of contraband liquors," consisting of empty cans, empty bottles, cartons for whiskey bottles, whiskey labels, labeling machines, bottle caps, crimping machines, corks, sealing wire, "whiskey barrels all containing whiskey chips and having strong odor of whiskey, and more than half containing small quantity of whiskey," and numerous other articles, all of which were alleged to have been "lawfully seized * * * at a place known as 1026–1028 Watson Street, Pittsburgh, Pennsylvania." (R. 3–8.)

As the Circuit Court of Appeals said (R. 96):

> The truth, established by the search, is that these respondents kept what might be called

a bootleggers' outfitting establishment, that is, an establishment to equip bootleggers with every article they would need in plying their unlawful trade. The prohibition agents, acting under the search warrant, seized about every movable thing in sight.

Automobiles, an adding machine, check protector, typewriter, and parcel-post scale were subsequently returned to the claimants. (R. 12–13.)

Prior to trial, counsel for the claimants moved to dismiss the libel on the ground that it was insufficient to support an order of forfeiture because it failed to allege or show that the seized property was in the lawful possession or custody of the United States. (R. 16–17.) The motion was denied (R. 17) and, following a trial, the court held that under the libel, answer and proof the Government was entitled to a decree of forfeiture (R. 73–74). Upon appeal, the decree was affirmed by the Circuit Court of Appeals. (R. 101–102.)

ARGUMENT

The question which the petitioner raises as to the construction of Section 25, Title II of the National Prohibition Act (copied on pages 2-3, *supra*) is one which is important and not free from doubt. The enforcement of prohibition will be seriously handicapped if the seizure and forfeiture of bottles and other articles used in bottling liquor are not permitted by law. We consequently do not oppose a review of this question.

The question is a variant of that raised in the Government's petition for a writ of certiorari in *United States of America* v. *Kohler Company*, No. 420, October Term, 1929. That case involves the construction of the identical section in the statute which is applicable to the present case, but the decision in that case would probably not cover the situation involved in the instant case. The instant case is the case referred to on page 14 of our brief in support of the petition in the *Kohler case*.

We submit that the decisions of the courts below as to the other questions raised in the instant petition were clearly right and that they are not of sufficient importance to warrant a review by this Court.

CHARLES E. HUGHES, JR.,
Solicitor General.
CLAUDE R. BRANCH,
HOWARD T. JONES,
Special Assistants to the Attorney General.
JOHN J. BYRNE,
Attorney.

OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

FILED
APR 19 19
CHARLES ELMORE

FILE COPY

No. 424

In the Supreme Court of the United States

OCTOBER TERM, 1929

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER BOTTLE COMPANY, CLAIMANTS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Summary of argument	4
Argument:	
I. The meaning of "manufacture" is before the Court but the question of design is not	5
II. As used in the national prohibition act, "manufacture" was intended to include preparing for the market	7
III. Decisions under the Tariff Acts are not controlling	21
Conclusion	27

CITATIONS

Cases:	
Anheuser-Busch Brewing Assn. v. *United States*, 207 U. S. 556	24
Arnold v. *United States*, 147 U. S. 494	25
Avignone v. *United States*, 12 F. (2d) 509	7
Bradleston v. *United States*, 104 Fed. 295	24
Belcher v. *Linn*, 24 How. 533	24
Campbell v. *United States*, 224 U. S. 99	6, 7
Carroll v. *United States*, 267 U. S. 132	11
Central Trust Co. v. *George Lueders & Co.*, 221 Fed. 829	8, 9, 25
City of Henderson v. *George Delker Co.*, 193 Ky. 248	8
City of Louisville v. *Zinmeister & Sons*, 188 Ky. 570	8
City of Memphis v. *St. Louis & S. F. R. Co.*, 183 Fed. 529	8
Coca-Cola Co. v. *J. G. Butler & Sons*, 229 Fed. 224	12
Coffey v. *United States*, 116 U. S. 427	7
De Bary v. *Arthur*, 93 U. S. 420	25
Donnelley v. *United States*, 276 U. S. 505	10, 21
Duignan v. *United States*, 274 U. S. 195	6
Friday v. *Hall & Kaul Co.*, 216 U. S. 449	26
Grogan v. *Walker & Sons*, 259 U. S. 80	10
Hartranft v. *Langfeld*, 125 U. S. 128	24
Hunter v. *E. S. Corning & Co.*, 86 Fed. 913	15
Johnson v. *Southern Pacific Co.*, 196 U. S. 1	26
Jones, Paul, & Co. v. *Mayes*, 265 Fed. 365	15

Cases—Continued. Page

Kearney v. *Case*, 12 Wall. 275 6
Lorrilard, P., Co. v. *Ross*, 183 Ky. 217 ..... 8, 9
Magone v. *Rosenstein*, 142 U. S. 604 24
Merritt v. *Stephani*, 108 U. S. 106 25
Nixa v. *Lehmann*, 70 Kans. 664 8
Phillips v. *Byers*, 189 Cal. 665 8
People v. *Luhrs*, 127 App. Div. (N. Y.) 634 12
People v. *Roberts*, 145 N. Y. 375 8
Purity Extract Co. v. *Lynch*, 226 U. S. 192 11
Rheinstrom, I., & Sons Co., In re, 207 Fed. 119 8
Richardson v. *Harmon*, 222 U. S. 96 10
Road District v. *St. Louis S. W. Ry Co.*, 257 U. S. 547 6
Rogers v. *United States*, 141 U. S. 548 6
Rouda v. *United States*, 10 F. (2d) 916 8
Sarah, The, 8 Wheat. 391 5
Schlemmer v. *Buffalo, Etc., Ry.*, 205 U. S. 1 26
Schlitz, Jos., Brewing Co. v. *United States*, 181 U. S. 584 .. 8 22, 24
Schmidt v. *Badger*, 107 U. S. 85 25
Standard Tailoring Co. v. *City of Louisville*, 152 Ky. 504 9
Taney v. *Penn Bank*, 232 U. S. 174 15
Taylor v. *United States*, 3 How. 197 24
Tide Water Oil Co. v. *United States*, 171 U. S. 210 24
United States v. *Allen*, 163 U. S. 499 25
United States v. *385 Barrels, Etc., of Wine*, 300 Fed. 565 7
United States v. *Katz*, 271 U. S. 354 ..... 10, 14
United States v. *One Lot of Intoxicating Liquor*, 27 F. (2d) 903 8
Wheeler v. *United States*, 75 Fed. 654 24
Woolner & Co. v. *Rennick*, 170 Fed. 662 11

Statutes:

Act of June 6, 1896, c. 337, 29 Stat. 253, sec. 6 (U. S. C., title 26, sec. 604) 18
Act of May 9, 1902, c. 784, 32 Stat. 193, sec. 4 (U. S. C., title 26, sec. 573) 18
Act of April 9, 1912, c. 75, 37 Stat. 81, sec. 3 (U. S. C., title 26, sec. 663) 18
Act of October 1, 1918, c. 178, 40 Stat. 973 (U. S. C., title 26, sec. 543) 18
Bottling in bond act of March 3, 1897, c. 379, 29 Stat. 626 (U. S. C., title 26, secs. 411–417)—
  Sec. 1 15
  Sec. 3 17
National prohibition act, c. 85, 41 Stat. 305, 315—
  Sec. 1 (U. S. C., title 27, sec. 4) 19
  Sec. 3 (U. S. C., title 27, sec. 12) 20
  Sec. 4 (U. S. C., title 27, sec. 13) 20
  Sec. 25 (U. S. C., title 27, sec. 39) 2

Statutes—Continued.

	Page
Revenue act of 1918, c. 18, 40 Stat. 1057—	
Sec. 605	17
Sec. 700 (d)	18
Revised Statutes—	
Sec. 3244 (U. S. C., title 26, sec. 204)	19
Sec. 3271 (U. S. C., title 26, sec. 361)	15
Sec. 3287 (U. S. C., title 26, sec. 367)	14, 18
Sec. 3354 (U. S. C., title 26, sec. 525)	18
Sec. 3362 (U. S. C., title 26, sec. 769)	18
Sec. 3392 (U. S. C., title 26, sec. 828)	18
Miscellaneous:	
Browne, Law of Trade Marks, 1873, p. 52	12

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 424

IKE DANOVITZ, SURVIVING PARTNER OF FEITLER Bottle Company, claimants, petitioner

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 63) is reported in 34 F. (2d) 30.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 19, 1929. (R. 70.) The petition for certiorari was filed September 26, 1929, and was allowed by this Court November 4, 1929. (R. 71.)

QUESTION PRESENTED

When this Court allowed the writ of certiorari, it limited argument to this one question:

Whether barrels, bottles, corks, labels, cartons, capping machines, whiskey siphons, filters, etc., seized in connection with whiskey and whiskey chips, may be property designed "for the manufacture of liquor intended for use in violating this title," within the meaning of Section 25, Title II, of the National Prohibition Act.

STATUTE INVOLVED

Section 25, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 315 (U. S. C., Title 27, Sec. 39), provides, so far as material here:

> It shall be unlawful to have or possess any liquor or property *designed for the manufacture of liquor intended for use in violating this title* or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. * * * (Italics ours.)

STATEMENT

The Government, by libel, sought forfeiture of claimants' property under Section 25, Title II, of the National Prohibition Act. The libel (R. 2–6) alleged a lawful seizure "at a place known as 1026-1028 Watson Street, Pittsburgh, Pennsylvania," of a quantity of liquor and of certain "property and material designed for the manufacture of contraband liquors." This property comprised—

Whiskey, whiskey chips, and whiskey barrels all containing whiskey chips; gin extract, gin bottles, and gin bottle caps; cans, jugs, demijohns, crocks, and empty bottles of all sizes, some in paper cases; bottle cartons, and cartons for whiskey bottles; corks, bottle caps, and Viscose caps; wrappers for whiskey bottles and assorted whiskey labels; cardboard fillers, cases, and bottle separators; paper bags, wrapping paper, and twine; sealing wire; labeling and crimping machines; siphons and filters; clyco, glycerine, syrup, and flavoring nuts.

By answer (R. 6–11), petitioner and one Manfred Feitler denied that this property was "contraband, or designed for the manufacture of contraband liquors, or held or used in violation of Section 25, Title II, of the National Prohibition Act or other laws." The issues were tried by the court without a jury. (R. 1.) Trial by jury *was not* waived in writing.

Following testimony by claimants, the court found that the allegations of fact in the libel had been sustained, and decreed forfeiture as prayed for. (R. 50, 56.) Upon appeal, the decree was affirmed by the Circuit Court of Appeals. (R. 70.)

SUMMARY OF ARGUMENT

Since there was no written waiver of jury, the review is limited to questions of law presented by the record proper. Proof of design is consequently not reviewable. The libel being sufficient, the only question is whether the property may be usable for "manufacture of liquor intended" for illegal use, that is, whether it is used in, or after, the manufacture.

The policy of the National Prohibition Act is to make the term "manufacture" inclusive. Within the meaning of the Act, it is submitted, no article is to be considered manufactured until put into condition for sale upon the market for the purpose for which it was intended to be used.

Section 25 emphasizes "liquor intended for use in violating this title," and indicates preparation for a market, as for a bottled trade, where descriptive bottles and caps are in the nature of a guaranty of genuineness.

In previous control of liquor, Congress has always treated preparing for the market as an incident of manufacture. Statutes affecting other

commodities recognize packing as an incident of manufacture.

Other parts of the National Prohibition Act indicate that manufacture includes preparation for the market. Thus, certain articles are excepted only when made and put up in containers as prescribed. With others, there is a line of demarcation between manufacture and sale, giving full control over manufacture and limited control over sale. The former ends "after having been manufactured and prepared for the market."

Liberally construed, the word "manufacture" includes preparation for the market, to which purpose this property was readily adaptable.

Under some Tariff Acts this Court has held that bottles and corks were not materials used in the manufacture of beer. These decisions are not controlling.

ARGUMENT

I

THE MEANING OF "MANUFACTURE" IS BEFORE THE COURT BUT THE QUESTION OF DESIGN IS NOT

This case arose on forfeiture proceedings based on a seizure on land; i. e., "at a place known as 1026–1028 Watson Street, Pittsburgh, Pennsylvania" (R. 2), tried to the court without a written waiver of a jury.

Ever since *The Sarah,* 8 Wheat. 391, it has been settled that the trial of all forfeiture cases of seizure on land is at common law and normally is before

a jury. And if such cases are tried in the District Court without written waiver of jury, an appellate court is limited to a consideration of such questions of law as may be presented by the record proper, such as whether the pleadings were sufficient to support the judgment. *Kearney* v. *Case,* 12 Wall. 275; *Campbell* v. *United States,* 224 U. S. 99, 106; *Road District* v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547, 562; *Duignan* v. *United States,* 274 U. S. 195, 198–199.

One of petitioner's contentions is that, even if the seized articles are considered as useful for "manufacture," the forfeiture was improper in the absence of a proved intention so to use them. But this is not now subject to review. The trial court found that the allegations of fact—that the property was "designed for the manufacture of contraband liquors"—had been sustained. (R. 50.) Under the circumstances, neither this Court nor the Circuit Court of Appeals can properly consider the bill of exceptions. *Rogers* v. *United States,* 141 U. S. 548, and cases cited *supra.*

There is no serious question of the sufficiency of the libel as a pleading. It alleged that certain property, described in detail, was "designed for the manufacture of contraband liquors." Except that "contraband liquors" was used instead of the statutory phrase "liquor intended for use in violating this title," the allegations of the libel were in the language of the statute (Section 25, Title II).

They were, therefore, sufficient. *Coffey* v. *United States,* 116 U. S. 427; *Avignone* v. *United States* (C. C. A., 2d), 12 F. (2d) 509; *United States* v. *385 Barrels, Etc. of Wine* (S. D., N. Y.), 300 Fed. 565. The substituted phrase was treated in the trial court as the equivalent of the statutory phrase and it is therefore sufficient here. *Campbell* v. *United States, supra,* p. 106.

Moreover, as the order of this Court granting the petition for certiorari contained the limitation that counsel should confine themselves "to the question whether the property seized is forfeitable under Section 25, Title II of the National Prohibition Act," it would seem that it is not open to the petitioner to question the sufficiency of the libel or the legality of the proceedings under which the property was seized. 280 U. S. 28A.

The only question presented by the record proper, therefore, is whether, as a matter of law, property of the kind described can not be used for the "manufacture of liquor intended" for illegal use. Petitioner contends that the acts of bottling, labeling, etc., can not be a part of manufacture, while the Government asserts that these acts may be a part of a manufacture for an intended illegal use, such as sale.

II

AS USED IN THE NATIONAL PROHIBITION ACT, "MANUFACTURE" WAS INTENDED TO INCLUDE PREPARING FOR THE MARKET

The word "manufacture" has been given a variety of meanings by judicial construction. The

courts have held: That baling of cotton is not manufacture (*City of Memphis* v. *St. Louis & S. F. R. Co.* (C. C. A., 6th), 183 Fed. 529, 539); that lumber for crates is not material on hand for the purpose of manufacture (*City of Henderson* v. *George Delker Co.*, 193 Ky. 248); that putting up spices for sale is not manufacture (*People* v. *Roberts*, 145 N. Y. 375); and that bottles and corks are not materials (i. e., ingredients) used in the manufacture of bottled beer (*Jos. Schlitz Brewing Co.* v. *United States*, 181 U. S. 584). On the other hand, it is said: That maraschino cherries, flavored, bottled, and labeled for the market are manufactured (*In re I. Rheinstrom & Sons Co.* (E. D. Ky.), 207 Fed. 119; *Central Trust Co.* v. *George Lueders & Co.* (C. C. A., 6th), 221 Fed. 829); that canners are manufacturers (*Phillips* v. *Byers*, 189 Cal. 665; *Nixa* v. *Lehmann*, 70 Kans. 664); and that a person, standing among jars of whiskey, alcohol, and water and pasting whiskey labels on bottles, is manufacturing liquor (*Rouda* v. *United States* (C. C. A., 2d), 10 F. (2d) 916). And in *United States* v. *One Lot of Intoxicating Liquor* (S. D. Texas), 27 F. (2d) 903, cans, crocks, bottles, and caps were forfeited as property designed for the manufacture of liquor.

Courts have experienced difficulty in determining what is included within the term "manufacture." *City of Louisville* v. *Zinmeister & Sons*, 188 Ky. 570. Indeed, *Central Trust Co.* v. *George Lueders & Co.*, *supra*, and *P. Lorrilard Co.* v. *Ross*, 183 Ky.

217, after reviewing the numerous decisions delineating it, recognize a contrariety of construction. Definitions of the lexicographers being of little aid, the term must be applied to the particular facts so as to effectuate the intent with which it was used in the statute. *Standard Tailoring Co.* v. *City of Louisville,* 152 Ky. 504. "The tendency of modern decision has been to appreciably expand the formerly prevailing definition of 'manufacture.'" *Central Trust Co.* v. *George Lueders & Co., supra,* p. 838. In the *Lorrilard case, supra,* it was said (p. 223):

> Numbers of cases may be found in which the courts have defined the words "manufacture," "manufacturer," "manufacturing," "manufactured," but in all these cases the courts constantly kept in mind the purpose of the legislation and endeavored to give such a construction to these words as would carry out the legislative intent, and on account of this inclination different meanings have been ascribed to the words; but it may safely be said that *the general rule is that no article is considered manufactured until it has been put into condition for sale on the open market for the purpose for which it was intended to be used.* (Italics ours.)

The sense in which the word "manufacture" is used in the National Prohibition Act depends, therefore, upon the intent of Congress, which, in turn, must be ascertained by the usual methods of statutory construction.

The policy of Congress respecting the subject-matter of the whole Act should be considered. *Richardson* v. *Harmon*, 222 U. S. 96. This Court has already decided that the purpose of both the Eighteenth Amendment and of the Act was "to stop the whole business" in so far as beverage liquor was concerned (*Grogan* v. *Walker & Sons*, 259 U. S. 80, 89); that the Act aimed to suppress "the entire traffic" in intoxicating liquor as a beverage (*United States* v. *Katz*, 271 U. S. 354, 357); and that it was both comprehensive and disclosed an intent fully to enforce the prohibition therein declared (*Donnelley* v. *United States*, 276 U. S. 505, 513).

In keeping with this policy, "manufacture" was used in its most inclusive sense. It was intended to prohibit all manufacture, except for the permitted purposes, and to reach all stages in the actual process up to and including the finished product in whatever condition that might be. The prohibition against possession of property designed for the manufacture of liquor was intended to reach all steps in the same process. Necessarily, it included the ultimate product as and when fashioned for sale or other disposition. This intention is emphasized by the descriptive phrase "liquor intended for use in violating this title." Such intended illegal uses undoubtedly meant (1) possession for beverage purposes, (2) transportation, (3) sale, and (4) export. That part of the process which prepared the article for any of these uses would, then, obviously be within the scope of manufacturing it

(i. e., making it ready) for that particular use. And "having regard to the artifices which are used to promote the sale of intoxicants" (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 205), Congress undoubtedly anticipated that synthetic and imitation liquors would be bottled, labeled, and packed for a market in which they could, with some semblance of verity at least, be there extolled as the work of the old masters. That imitations were recognized long before prohibition, is indicated in *Woolner & Co.* v. *Rennick* (S. D., Ill.), 170 Fed. 662, 664:

> That there is a product called "whisky," and also a product called "imitation whisky," the law itself clearly contemplates, and section 3244 (U. S. Comp. St. 1901, p. 2096), in defining what is meant by the business of rectifying, denominates the maker of imitation whisky and other imitation liquors as a rectifier * * *.

While not at this time interested in the possible fraud on the public or in misbranding, Congress undoubtedly intended to prohibit the manufacture of liquor intended for this kind of sale as well as for any other purpose prohibited by Title II. So, in this aspect, "liquor intended for use in violating this title" is equivalent to "liquor intended for illegal sale"—a class of liquor which no one will contend that Congress did not mean to abolish. And manufacture becomes, then, more than a mere making of liquor, for, as this Court said in *Carroll* v. *United States*, 267 U. S. 132, 154:

> The mere manufacture of liquor can do little to defeat the policy of the Eighteenth Amendment and the Prohibition Act, unless the forbidden product can be distributed for illegal sale and use.

It is, furthermore, reasonable and sensible to assume that Congress used the word "manufacture" to include the preparation of liquor for a trade which demanded bottled goods. A select trade may require as much of any manufacturer; and he is still a manufacturer when he prepares his product to meet that demand. When the National Prohibition Act was passed, it was not uncommon to use labels and bottles of well-known shapes and designs for many liquors. They had a value to the manufacturer and the product was prepared in such manner as to capitalize that value for him. It had come to be a basic principle in trade-mark jurisprudence. "All the world should be enabled to test the genuineness of goods by the mark placed upon them." Browne, Law of Trade Marks, 1873, p. 52. The courts have recognized it as a manufacturer's asset, *Coca-Cola Co.* v. *J. G. Butler & Sons,* 229 Fed. 224, 230, saying that descriptive bottles and caps are an assurance that the article has been put up under the manufacturer's supervision and direction. *People* v. *Luhrs,* 127 App. Div. (N. Y.) 634, 635, applied it to whiskey:

> The trade-mark and label guarantees that the whisky in the bottle has not only been manufactured by the Wilson Distilling Company,

but that the contents of the bottle have been placed in that identical bottle by the said company.

It was not unreasonable, then, that Congress should have intended to include bottling, labeling, and packing in manufacture.

The Eighteenth Amendment forbids manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes. Intending to make these prohibitions effective, Title II used the same generic terms of proscription. And since Congress acted most comprehensively, it must be assumed that it intended to exclude neither the process of barreling, bottling, capping, and labeling of liquor—a well-recognized part of the forbidden traffic—nor the property usable therefor. Being, concededly, not transportation, or importation, or exportation, the act of barreling, bottling and capping, or labeling liquor must come within the purview either of manufacture or of sale. It could hardly be included in sale, for it may be, and often is, completely finished before there is even an offer of sale. And sale, having a well-defined meaning, never embraces those things which antedate an offer of sale. But it is fair to say that all acts necessary to prepare liquor for sale—from the assembling of the utensils and ingredients to the finishing of the product, bottled or barreled as the case may be, and labeled as desired—are included in the manufacture. Those things

which a manufacturer customarily does before sale may reasonably be said to be manufacture. For instance, the manufacturer of breakfast food puts the commodity in a sealed package ready for use. The manufacturer of paints puts the paint in a labeled can. The manufacturer of carbonated soft drinks puts the flavored liquid in air-tight bottles. Indeed, the manufacturer of any liquid must bottle his product to preserve it against evaporation. These illustrations may be multiplied indefinitely.

Neither the Amendment nor the Act contemplated a hiatus in controlling the liquor from its origin to the time it reaches the ultimate consumer. Barreling, bottling, capping, and labeling, not being a part of the sale, must be a part of manufacture.

Considering the control of liquor in previous legislation as a guide to legislative intent (*United States* v. *Katz, supra,* p. 357), it should be observed that barreling, bottling, marking, stamping, and labeling not only devolve upon the manufacturer but they were not uncommonly treated by Congress as a part of the process of preparing for the market. And as such an incident of manufacture, these acts were closely regulated and controlled.

Upon coming from the cistern, the whiskey is required to be drawn into casks or packages, marked and stamped in a certain manner, and then removed to the warehouse for aging. Section 3287 R. S., as amended (U. S. C., Title 26, Sec. 367). It is a matter of common knowledge, and therefore judicially known, that whiskey "is not ready to be

marketed for consumption when it is drawn from the still" but must undergo an aging process, for which purpose it is kept in store for several years (*Taney* v. *Penn Bank*, 232 U. S. 174, 184), and that it is stored in barrels charred on the inside (*Paul Jones & Co.* v. *Mayes* (W. D., Ky.), 265 Fed. 365). The barrel soakage is discussed in *Hunter* v. *E. S. Corning & Co.* (C. C. A., 7th), 86 Fed. 913. This aging process is imposed upon the distiller, who must keep the whiskey, at his own expense, at a "warehouse, to be situated on and to constitute a part of his distillery premises." Section 3271 R. S. (U. S. C., Title 26, Sec. 361). During this time it may be completely distilled, but it is not yet completely manufactured for the trade.

After thus aging, the whiskey was controlled by the Bottling in Bond Act of March 3, 1897, c. 379, 29 Stat. 626 (U. S. C., Title 26, Sections 411–417). This legislation indicated that Congress recognized trade usages, knew that whiskey was made, aged, stored, and withdrawn for certain trade purposes, and accordingly regulated the business with a proper perspective of the extremely close relation between distilling on the one hand and bottling, labeling, and packing on the other. It provided:

> SEC. 1. That whenever any distilled spirits * * * have been duly entered for withdrawal upon payment of tax, or for export in bond, and have been gauged and the required marks, brands, and tax-paid stamps or export stamps, as the case may be, have

been affixed to the package or packages containing the same, the distiller or owner of said distilled spirits, if he has declared his purpose so to do in the entry for withdrawal, which entry for bottling purposes may be made by the owner as well as the distiller, may remove such spirits to a separate portion of said warehouse which shall be set apart and used exclusively for that purpose, and there, under the supervision of a United States storekeeper, or storekeeper and gauger in charge of such warehouse, may immediately draw off such spirits, bottle, pack, and case the same: * * *.

Every bottle when filled shall have affixed thereto and passing over the mouth of the same such suitable adhesive engraved strip stamp as may be prescribed, as hereinafter provided, and shall be packed into cases to contain six bottles or multiples thereof, and in the aggregate not less than two nor more than five gallons in each case, which shall be immediately removed from the distillery premises. Each of such cases shall have affixed thereto a stamp denoting the number of gallons therein contained, such stamp to be affixed to the case before its removal from the warehouse, and such stamps shall have a cash value of 10 cents each, and shall be charged at that rate to the collectors to whom issued, and shall be paid for at that rate by the distiller or owner using the same.

And there shall be plainly burned on the side of each case, to be known as the Government side, the proof of the spirits, the regis-

tered distillery number, the State and district in which the distillery is located, the real name of the actual bona fide distiller, the year and distilling season, whether spring or fall, of original inspection or entry into bond, and the date of bottling, and the same wording shall be placed upon the adhesive engraved strip stamp over the mouth of the bottle. * * *

SEC. 3. That all distilled spirits intended for export under the provisions of this Act shall be inspected, bottled, cased, weighed, marked, labeled, stamped, or sealed in such manner and at such time as the Commissioner of Internal Revenue may prescribe; * * *.

Because either the distiller or the owner may do the bottling, it may be asserted that this Act is not indicative of a purpose to subjoin the bottling to the manufacturing of whiskey. However this may be, Congress has plainly indicated that the kind of package and the kind of label are important in determining what kind of manufactured liquor it is (whether distilled or rectified) and accordingly how the manufacturer thereof shall be taxed. Thus, Section 605, Revenue Act of 1918, c. 18, 40 Stat. 1057, 1108, provided that all distilled spirits "not contained in the *distillers' original stamped* packages, or in bottles or other containers bearing the *distillers' original labels,* shall * * * be regarded as rectified spirits." (Italics ours.)

True, there must be some spatial separation between the distillery and the warehouse (Section

3287 R. S.; U. S. C., Title 26, Sec. 367), and in the case of beer, between the brewery and the bottling house (Section 3354 R. S., as amended; U. S. C., Title 26, Sec. 525); but this is intended as a protection against fraud on the revenue and not as a dividing line between a manufactured product and an unmanufactured product.

In like manner, when Congress regulated the production of other commodities, the packing of the article has always been treated as an incident of its manufacture. Thus, a "manufacturer" of cigars is required to pack his cigars and cigarettes in a certain manner. (Section 3392 R. S.; U. S. C., Title 26, Sec. 828.) The same requirement is placed upon a "manufacturer" of cigarettes. (Section 700 (d), Revenue Act of 1918, c. 18, 40 Stat. 1057, 1117.) So, too, certain commodities "shall be *packed by the manufacturer* thereof" in certain kinds of packages or containers, viz., oleomargarine (Act of October 1, 1918, c. 178, 40 Stat. 973, 1008; U. S. C., Title 26, Sec. 543); adulterated butter (Section 4, Act of May 9, 1902, c. 784, 32 Stat. 193; U. S. C., Title 26, Sec. 573); filled cheese (Section 6, Act of June 6, 1896, c. 337, 29 Stat. 253; U. S. C., Title 26, Sec. 604); phosphorus matches (Section 3, Act of April 9, 1912, c. 75, 37 Stat. 81; U. S. C., Title 26, Sec. 663); and manufactured tobacco (Section 3362 R. S., as amended; U. S. C., Title 26, Sec. 769).

Furthermore, in the definition of rectifiers, Congress especially recognized that in the manufacture of imitation liquors the name under which they

were to be sold formed a component part of the manufacture. Section 3244 R. S. (U. S. C., Title 26, Sec. 204) provides:

> * * * every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors for sale, under the name of whiskey, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name shall be regarded as a rectifier * * *.

Even the National Prohibition Act, in parts other than Section 25, reflects the close association with which Congress viewed the actual making and the bottling, labeling, and packing of liquor. As stated above, when Congress prohibited the manufacture of liquor and of property designed for its illegal manufacture, it intended to reach all steps in the actual process up to and including the finished product. Hence, the word "manufacture" was used in its broadest sense, without qualification or amplification. But in addition to its prohibitions, the Act permitted certain things to be manufactured. In permitting this, it not only made due allowance for the broadest use of the term but also regulated the various phases of manufacture.

Thus, in Section 1, Title II, dealcoholized wine and any beverage made by the process by which beer, ale, porter, or wine is produced, are excepted

from the statutory definition of intoxicating liquor. But this is only when it "is made as prescribed * * * and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers" as may be prescribed.

Section 4, Title II, indicates the dividing line between the completed manufacture and the sale and should, therefore, delineate the ultimate in "manufacture" as used throughout the Act. By Section 4, Congress retained the broadest regulatory control over the manufacture of the articles named, in marked distinction to the control of their sale only when they are diverted to beverage uses. To this end, it provides that certain articles "*after having been manufactured and prepared for the market,*" shall not be subject to the provisions of the Act unless thereafter they are sold for beverage purposes. This close control over manufacture is in keeping with the policy of Congress, based on years of experience in regulating the manufacture of taxable articles. It was fitting that the control should be extensive, not restrictive. The same is true of manufacture for illegal uses and of the control of property designed for such manufacture. Here too, the term should be extensive, including all steps in the process, up to and including the preparation for the market.

Such a construction lies well within the avowed purposes of the Act.

A situation more paralyzing to the purpose and functioning of the Act would be difficult to imagine than a *carte blanche* to "bootlegger outfitters."

At least, Section 25 should be liberally construed. The Act itself (Section 3, Title II) bespeaks a liberal construction for all of its provisions to the end that the use of intoxicating liquor as a beverage shall be prevented. Probably with this section in mind, this Court has already said (*Donnelley* v. *United States,* 276 U. S. 505, 512):

> The rule that penal statutes are to be strictly construed in favor of persons accused is not violated by allowing the language to have its full meaning where that construction is in harmony with the context and supports the policy and purposes of the enactment.

So construed, Section 25 includes preparation for the market. The property here involved is readily designed for that purpose.

III

DECISIONS UNDER THE TARIFF ACTS ARE NOT CONTROLLING

It should be pointed out that this Court has heretofore considered the question of whether, under certain statutes, bottles, corks, and tin foil are articles used in the manufacture of intoxicating liquor (beer). But we submit that the purpose of the statutes that were construed was so foreign to the purpose of the National Prohibition Act which contains the same construed words, that

those decisions holding that bottles and corks are not used in manufacturing liquor (beer) are in no way controlling of the question in the case at bar—and for the reasons hereinafter set forth.

One of the principal cases is *Jos. Schlitz Brewing Co.* v. *United States,* 181 U. S. 584. That was a suit for drawback of duties paid on imported hops, barley, bottles, and corks used in connection with the manufacturing, bottling, and exportation of beer. The question was whether these were "imported materials * * * used in the manufacture of articles manufactured or produced in the United States" and subsequently exported, within the meaning of Section 25 of the Tariff Act of October 1, 1890, c. 1244, 26 Stat. 567, 617, commonly known as the McKinley Act, which section read:

> where imported materials on which duties have been paid, are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties.

Claimant's contention was that there was a difference between the manufacture of ordinary beer and the manufacture of beer bottled for export, and that in the manufacture of the latter kind of beer the bottles and corks, because of the particular use made of them, were in fact used in the "manufacture" of the beer. The two processes of manufacture are fully set out in the report of the case in the

Court of Claims. 35 C. Cls. 110. In passing on the contention the Court of Claims, though conceding that from one point of view the bottle is as much an element of the intended product as the peculiar kind of beer which it contains, held that under the authorities cited, the bottles were a finished product and not "materials used" in the combination which was the subject of suit.

Upon appeal this Court, in affirming the Court of Claims, held that the language of the statute meant that the "imported materials" must enter into and form ingredients of the manufactured article; that beer was the article manufactured; that "bottled beer" was still beer; that hops and barley formed such ingredients but bottles did not; that they were not "imported materials" but finished products, and only an incasement. Yet this Court indicated that the bottled beer was not "finally manufactured" and ready for market until the bottles had been used in the manner which claimant contended made the bottles and corks "materials * * * used in the manufacture of" the beer, when it said (p. 588):

> The fact that the beer must be steamed after bottling to a point necessary to kill the germs of yeast, and for that purpose must be enclosed in some vessel to prevent the escape of the carbonic acid gas, only *shows that the beer is bottled before it is finally manufactured and ready for the market.* (Italics ours.)

The word "manufacture" or "manufactured" in Tariff Acts was interpreted in the following cases: *Wheeler* v. *United States,* 75 Fed. 654, decided 1896; *Tide Water Oil Co.* v. *United States,* 171 U. S. 210, decided 1898; *Beadleston* v. *United States,* 104 Fed. 295, decided 1899; *Jos. Schlitz Brewing Co.* v. *United States,* 181 U. S. 584, decided 1901; *Anheuser-Busch Brewing Assn.* v. *United States,* 207 U. S. 556, decided 1908.

The same section (Sec. 25, Tariff Act of October 1, 1890) and the same words interpreted in the *Schlitz case* were involved in the *Wheeler, Beadleston,* and *Anheuser-Busch cases,* all relating to bottles and corks. The Court's decisions were uniform to the effect that *within the meaning of that section* the bottles and corks were not " materials " used in the "manufacture" of beer.

But the *Schlitz* and other cases cited above all involved interpretation of language in a Revenue Act, and the language was interpreted with the purposes of such Acts and rules of statutory construction thereof in mind.

Revenue laws should be construed so as most effectively to accomplish the intention of the legislature in passing them. *Taylor* v. *United States,* 3 How. 197, 210.

The predominant use to which articles are applied determines their character within the Tariff Act. *Hartranft* v. *Langfeld,* 125 U. S. 128.[1]

[1] For tariff purposes, coverings such as barrels (*Belcher* v. *Linn,* 24 How. 533), boxes (*Magone* v. *Rosenstein,* 142 U. S.

The idea that runs through the Tariff Act of 1890 (the Act under construction in the *Schlitz case*) is that of protection of American manufacturers. *Arnold* v. *United States*, 147 U. S. 494, 497. It is submitted that this is the purpose of most tariff legislation.

A claim for drawback of duty on imports is within the rule that exceptional privileges or exemptions from the general operation of law must be *strictly construed and doubts resolved against* the claimant for drawback. *United States* v. *Allen*, 163 U. S. 499, 504.

Courts recognize these rules where construction of revenue statutes are involved. The Circuit Court of Appeals for the Sixth Circuit in *Central Trust Co.* v. *George Lueders & Co.*, 221 Fed. 829, reviewing the foregoing cases in connection with interpretation of "manufacturing," pointed out that the interpretation in them was technical, saying (p. 839):

> *Considering the purpose of the statute,* we think it more natural to conclude that the Legislature used the term "manufacturing establishment" in its ordinary sense, rather than in its technical meaning, as used in relations to which the object of the statute is

604), filled glass bottles (*Merritt* v. *Stephani*, 108 U. S. 106), bottles containing beer (*Schmidt* v. *Badger*, 107 U. S. 85), bottles containing wine (*DeBary* v. *Arthur*, 93 U. S. 420), are customarily regarded as separate articles from the contents thereof, and are taxable or not as the statute may require.

entirely foreign, viz., *tariff cases* and *tax exemptions*. (Italics ours.)

Thus the claim in the *Schlitz* and other cases above was for an exceptional privilege or exemption, and the ruling that bottles and corks are not used in manufacturing beer was made under the rule of strict construction of the statutory language in a Revenue Act. But if necessary in order to carry out the intention of Congress, courts will liberally construe the language of a statute. *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo, etc., Ry.*, 205 U. S. 1. And in *Friday* v. *Hall & Kaul Co.*, 216 U. S. 449, holding that the intention of Congress was to be regarded, this Court liberally construed "manufacturing" as used in the Bankruptcy Act.

The word "property" in the language involved in the case at bar is more comprehensive than the word "materials" which was involved in the *Schlitz* and other cases. Under the revenue statutes "materials" and "ingredients" were, in effect, held to be synonymous. To hold that "property" in Section 25, Title II, National Prohibition Act, was used synonymously with "ingredients" would so narrow the scope of the section as to defeat the purpose of Congress. The words involved in the case at bar are given the narrow meaning only in cases construing Revenue Acts, the objects of which are entirely foreign to the object of the National Prohibition Act; and it is submitted that in view of the policy and intention of Congress in enacting

the latter Act, the *Schlitz* and other cases, *supra*, decided under the rules of strict construction, are not decisive of the question here involved.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
NORMAN J. MORRISSON,
D. HEYWOOD HARDY,
Special Assistants to the Attorney General.

CHARLES P. SISSON,
Assistant Attorney General,
Of Counsel.

APRIL, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

SUPREME COURT OF THE UNITED STATES.

No. 424.—October Term, 1929.

Ike Danovitz, Surviving Partner of Feitler Bottle Company, Claimants, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 5, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a libel for the forfeiture of alleged contraband liquors, property and material designed for the manufacture of contraband liquors, specifically described, and alleged to have been unlawfully held in violation of Section 25, Title II, of the National Prohibition Act. The District Court found that the allegations of fact contained in the libel were sustained and ordered a decree of forfeiture. The decree was affirmed by the Circuit Court of Appeals, 34 F. (2d) 30. A writ of certiorari was granted by this Court but confined to the single question whether the property seized is forfeitable under Sec. 25, Title II, of the National Prohibition Act. 280 U. S. —.

The property in question was containers, barrels, bottles, corks, labels, cartons, &c. By the statute it is "unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this chapter or which has been so used, and no property rights shall exist in any such liquor or property." A search warrant may issue "and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order." Act of October 28, 1919, c. 85, Title II, § 25, 41 Stat. 305, 315. U. S. Code, Title 27, § 39. The argument for the petitioner, so far as it does not go beyond the limits

set in granting the writ of certiorari, is that empty containers, bottles and the other apparatus described, cannot be used in or designed for the manufacture of liquor, because the manufacture is completed before that apparatus comes into play. There is a further argument that the containers were not designed in fact for the manufacture of liquor even if they could be, but the objection to this is that if the terms in which the writ was granted do not exclude it, the case having been tried without written waiver of jury, the sufficiency and effect of evidence are not open. *Commissioner of Road District No. 2* v. *St. Louis Southwestern Ry. Co.*, 257 U. S. 547, 562.

The argument for the petitioner cannot be helped by amplification. It is obviously correct if the word "manufacture" be taken in the strictest and most exact sense. But the word may be used in a looser way to express the whole process by which an article is made ready for sale on the open market. *P. Lorrilard Co.* v. *Ross*, 183 Ky. 217, 223. As the purpose of the Prohibition Act was to "suppress the entire traffic" condemned by the Act, *United States* v. *Katz*, 271 U. S. 354, 357, *Donnelley* v. *United States*, 276 U. S. 505, 513, it should be liberally construed to the end of this suppression, and so directs. Title II, § 3, of the Act. Code, Title 27, § 12. The decisions under the revenue acts have little weight as against legislation under the afflatus of the Eighteenth Amendment. We are of opinion that the word was used in this looser way, and that if the empty containers and the other objects seized were offered for sale in such a mode as purposely to attract purchasers who wanted them for the unlawful manufacture, as we interpret the word, they were designed for that manufacture and could be seized.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.